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pursuits . . . or extra-curricular activities." The University's Office of Affirmative Action issued an interpretive guide to the policy which gave examples of sanctionable conduct including, "[a] male student makes remarks in class like 'Women just aren't as good in this field as men.'" In another section headed "YOU are a harasser when . . . ," the guide added examples such as "you tell jokes about gay men and lesbians," "your student organization sponsors entertainment that includes a comedian who slurs Hispanics," and "you comment in a derogatory way about a . . . group's cultural origins, or religious beliefs." Charges were brought under the policy against a social work student for stating in class that he believed that homosexuality was a treatable disease, though the charge was eventually dismissed; against another student for reading in class a limerick satirizing the homosexual orientation of a well-known athlete; and against a third student for stating that a minority faculty member was not fair to minority students in her dentistry class. Id.

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I thought in these circumstances it would be better to have a clear and narrow definition of what kind of individual acts of verbal abuse would be subject to discipline. My proposal was to limit it to speech targeted to individuals, with intent to insult, using racial epithets or their equivalents. n40 This was a very narrow [*904] definition; it meant that even the well-known epithets could be addressed with hateful intent to a general audience, and that individual targeted insults that did not use racial epithets or their equivalent would also not be punishable, even when motivated by bigotry and intended to drive the victim out of the university.

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n40 The Appendix to this Article contains the actual text. The requirement of intent to insult meant that use of epithets in an attempt at banter or in-group usage, even an unwelcome and insensitive one, would not be punishable. The definition of epithets or their equivalent required use of a word or symbol "commonly understood to convey visceral hatred or contempt;" this meant that if there was any doubt whether a word or symbol was a hate epithet or equivalent, it wasn't. The accompanying commentary identified words such as "nigger," "kike," "cunt," and "faggot," and symbols like the burning cross and the swastika as examples of words or symbols that met the "commonly understood" test. It gave the Confederate flag as an example of a symbol that would not meet this test.

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The theory behind this narrowly limited definition was to restrict the punishment of verbal abuse under the anti-discrimination policy to a category of speech that was independently regulable under the First Amendment -- "insulting or 'fighting' words" or symbols, those "which by their very utterance inflict injury or tend to incite to an immediate breach of the peace." n41 This narrow definition immunized cruel insults that could inflict as much injury as those prohibited, but in my judgment a narrow and reasonably objective definition was necessary if campus administrators were to be disabled from imposing the kind of censorship that had been visited on disfavored viewpoints at Michigan. The policy was never meant to substitute for the hard work of creating a generally hospitable environment for a diverse student body, a goal that everyone recognized had to be pursued by means other than disciplinary regulation. n42

Its [*905] main point was to narrow the scope of prohibited verbal abuse to those epithets that everyone would recognize as genuinely harmful, and that no one would want to defend as contributing to campus discussion or debate. n43

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n41 Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942). For a legal defense of the continued viability of the "inflict injury" branch of Chaplinsky, which some commentators have argued has been eliminated by subsequent decisions, see infra note 54 and accompanying text. In common sense terms, the idea is that an utterance sufficiently devoid of value to be punishable when aimed at someone who is ready and able to fight shouldn't become constitutionally protected just because the victim is in a wheelchair.

n42 The commentary to the Policy stated:

In general, the disciplinary requirements that form the content of the Fundamental Standard are not meant to be a comprehensive account of good citizenship within the Stanford community. They are meant only to set a floor of minimum requirements of respect for the rights of others, requirements that can be reasonably and fairly enforced through a disciplinary process. The Stanford community should expect much more of itself by way of tolerance, diversity, free inquiry and the pursuit of equal educational opportunity than can possibly be guaranteed by any set of disciplinary rules.

See infra Appendix.

n43 Thus fitting the Supreme Court's description of "insulting or 'fighting' words" as one of "certain well-defined and narrowly limited classes of speech" outside the protection of the First Amendment because their utterance is "no essential part of any exposition of ideas" and of such "slight social value as a step to truth" that they can be prohibited on the basis of "the social interest in order and morality." Chaplinsky, 315 U.S. at 571-72.

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And while the policy was controversial, no one in fact did argue that it banned speech which needed to be heard. The main point of attack was always the appearance of ideological bias. It was said that students of color, women, and gays and lesbians, the favored minorities of the politically correct, were protected from being called the names that are hurtful to them, while conservative students could freely be called "racist" or "fascist pig," veterans could have American flags burned in front of them, and the average apolitical student could have his mother called a whore to his face, all without any disciplinary recourse.

This line of criticism could have been blunted by moving the policy away from its roots in the university's anti-discrimination guarantee. If harassment violates students' rights, why not simply proceed against harassment -- why single out discriminatory harassment as a special target? Or if outrageous personal insults do harm and are not constitutionally protected, why not simply prohibit all such insults? These were the central questions from the start, and let me quote in full the answers to them that appeared in the original commentary to the policy:

Why prohibit "discriminatory harassment," rather than just plain harassment?

Some harassing conduct would no doubt violate the Fundamental Standard whether or not it was based on one of the recognized categories of invidious discrimination -- for example, if a student, motivated by jealousy or personal dislike, harassed another with repeated middle-of-the-night [*906] phone calls. Pure face-to-face verbal abuse, if repeated, might also in some circumstances fit within the same category, even if not discriminatory. The question has thus been raised why we should then define discriminatory harassment as a separate violation of the Fundamental Standard.

The answer is suggested by reflection on the reason why the particular kinds of discrimination mentioned in the University's Statement on Nondiscriminatory Policy are singled out for special prohibition. Obviously it is University policy not to discriminate against any student in the administration of its educational policies on any arbitrary or unjust basis. Why then enumerate "sex, race, color, handicap, religion, sexual orientation, and national and ethnic origin" as specially prohibited bases for discrimination? The reason is that, in this society at this time, these characteristics tend to make individuals possessing them the target of socially pervasive invidious discrimination. Persons with these characteristics thus tend to suffer the special injury of cumulative discrimination: they are subjected to repetitive stigma, insult, and indignity on the basis of a fundamental personal trait. In addition, for most of these groups, a long history closely associates extreme verbal abuse with intimidation by physical violence, so that vilification is experienced as assaultive in the strict sense. It is the cumulative and socially pervasive discrimination, often linked to violence, that distinguishes the intolerable injury of wounded identity caused by discriminatory harassment from the tolerable, and relatively randomly distributed, hurt of bruised feelings that results from single incidents of ordinary personally motivated name-calling, a form of hurt that we do not believe the Fundamental Standard protects against.

Does not "harassment" by definition require repeated acts by the individual charged?

No. Just as a single sexually coercive proposal can constitute prohibited sexual harassment, so can a single instance of vilification constitute prohibited discriminatory harassment. The reason for this is, again, the socially pervasive character of the prohibited forms of discrimination. Students [*907] with the characteristics in question have the right to pursue their Stanford education in an environment that is not more hostile to them than to others. But the injury of discriminatory denial of educational access through maintenance of a hostile environment can arise from single acts of discrimination on the part of many different individuals. To deal with a form of abuse that is repetitive to its victims, and hence constitutes the continuing injury of harassment to them, it is necessary to prohibit the individual actions that, when added up, amount to institutional discrimination. n44

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n44 Stanford Policy, infra, Appendix.

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In my view, a campus-wide prohibition of all outrageous insults of one student by another was never a serious possibility. n45 Those enforcing such a prohibition would have to distinguish in a wide range of situations between genuinely harmful insults, and ordinary though deplorable rudeness, and decide which should be subject to the heavy apparatus of formal discipline. It would have been an administrative nightmare, a gross misuse of University resources, and an invitation to selective and potentially biased enforcement. By contrast, the hate epithets are a well-recognized and narrowly limited class of expressions, and they are quite generally understood to be among the most serious kind of "fighting words" when used with insulting intent.

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n45 In a strongly-worded attack on the Stanford policy, Charles Fried argued that Stanford's failure to adopt a broad regulation requiring generally civil speech of students in their interactions even outside the classroom showed the University's narrower prohibition of bigoted epithets to be "not quite wholesome" -- i.e., ideologically biased. Charles Fried, The New First Amendment Jurisprudence: A Threat to Liberty, 59 U. CHI. L. REV. 225, 246 (1992). This was in response to my statement that while civility-based speech restrictions were appropriate in the classroom, where teachers can enforce a general prohibition of name-calling in a limited setting, they were not feasible as a campus-wide disciplinary rule. Thomas C. Grey, Discriminatory Harassment and Free Speech, 14 HARV. J.L. & PUB. POL'Y 157, 158-59 (1991).

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More plausible than prohibiting all serious insults would have been a policy prohibiting all harassment, not just discriminatory harassment. On one quite natural understanding of the concept, that would have made it an offense to persist in abusive or annoying interaction with someone after their desire for it to cease was made known. As the commentary quoted above shows, I [*908] took such a prohibition to be implicitly in place under the Fundamental Standard, and President Casper's statement after the invalidation of the policy this last year confirms that to be the case today: "Harassment, whether accompanied by speech or not, including harassment that is motivated by racial or other bigotry, continues to be in violation of the Fundamental Standard." n46

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n46 See Case Won't Be Appealed, supra note 1, at 13.

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Confining student disciplinary liability to harassment in this sense, however, would immunize all individual incidents of verbal abuse, and thus leave those who face a widespread form of prejudice unprotected against the harassing effect of cumulated abusive insults from many different individuals. Twenty separate students could each call Ray Wells "nigger" or Mary Carr "cunt," and nothing could be done to stop any of them. In my opinion, the University would be in breach of federal law and in default of its moral obligations to its students if it let this happen.

And under a simple prohibition of harassment, what would happen if one drunken undergraduate unleashed a stream of racial epithets at a fellow

student in a single episode, and then stood unrepentantly on what he conceived to be his dog's right to one free bite? That would tempt the University to argue that, after all, a single act can indeed constitute harassment. Why? Because such acts, cumulated, can surely produce the effect upon an individual victim that makes harassment punishable -- or even because a single seriously abusive insult can constitute harassment by itself. n47 Today, as I write, it is not clear whether [*909] President Kennedy's 1989 statement that a single face-to-face insult using a racial epithet would violate the Fundamental Standard -- a statement issued before the promulgation of the now-invalidated policy, hence under the current status quo -- still states University policy.

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n47 See Alan E. Brownstein, Hate Speech and Harassment: The Constitutionality of Campus Codes That Prohibit Racial Insults, 3 WM. & MARY BILL RTS. J. 179, 201-02 (1994). Professor Brownstein writes that "someone who disturbs a woman at three in the morning with a phone call filled with vulgar sexual ravings may be guilty of harassment on the basis of that call alone." Id. A recent Alabama decision sustained a harassment conviction against First Amendment challenge, over one dissent, on the basis of a single expressive act, though on the dubious basis of the "fighting words" doctrine. T. W. v. State, 665 So. 2d 987 (Ala. Crim. App. 1995). The court was construing a statute to provide:

[A] person commits the crime of harassment if, "with intent to harass . . . another person, he . . . makes an obscene gesture towards another person," . . . the term "obscene gesture" . . . narrowly . . . appl[ies] to only those gestures made in conjunction with "fighting words," or words that provoke physical retaliation and an immediate breach of the peace.

Id. at 988. The striking underlying facts, which might provide the premise for a vigilante movie, obviously tempted the court to stretch doctrinal boundaries. A juvenile was charged with raping a teenage girl, but had the charge dismissed when the police lost crucial evidence. Id. The juvenile confronted the girl and her mother, grabbed his crotch, and shook it in their direction, and was charged with "harassment" for this single act. Id.

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Uncertainties like these must exist as long as there is no definition of the speech that can be punished as harassment. Imperfect as it no doubt was, the Stanford policy did provide a reasonably clear definition, and one that encompassed only acts of verbal abuse that no one could seriously argue were contributions to robust campus political or cultural debate. The policy was a practical success in its own terms; no charges were brought under it, nor so far as I have been able to find out was it ever used by campus administrators to threaten students or win concessions from them because of their conservative or otherwise "politically incorrect" views or attitudes. n48 Its narrow application to acts that no one was likely to openly commit (or defend on their merits if committed by others) was what made me think the policy worth having in the first place, and what makes me believe that its invalidation was no victory for the cause of civil liberties on the Stanford campus.

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n48 See supra note 10 and accompanying text. In Nat Hentoff's column celebrating the invalidation of the policy, he quoted an anonymous student as saying that the absence of prosecutions showed that the policy had a powerful chilling effect! Hentoff, supra note 21, at B5. But there had been no publicly reported incidents before the policy was enacted that would have violated its terms. The extremely narrow terms of the policy, confined to directly addressed insults using racial epithets or their equivalents, made it unlikely that on a campus like Stanford's there would be many cases that would support plausible charges of violation. Students of color and gay and lesbian students on campus have told me of instances in which its terms were violated, both before and after the enactment, but always by anonymous notes or messages.

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[*910] III. WHY THE POLICY WAS LEGAL

Now let me say why I think the policy was legal under First Amendment doctrine, treating Stanford as though it were a public university, and accepting R.A.V. v. City of St. Paul as stating the law of the First Amendment. (Later, I will say where I disagree with R.A.V.)

In its opinion, the court in Corry v. Stanford University invalidated the policy on two separate grounds. First, the policy was overbroad under the Chaplinsky doctrine, in that its concept of "insulting or 'fighting' words" punished speech that did not threaten immediate violence. Second, even if the policy did prohibit only unprotected speech, its focus on bigoted insults while leaving others permitted amounted to improper ideological bias or "viewpoint discrimination" under R.A.V.

Each of these grounds has some support in the case law -- enough that if I had known that R.A.V. and the Leonard Law were coming I probably would have drafted the policy differently to limit litigation risk. n49 But I do think the better view of existing First Amendment law sustains the Stanford provision. First, I argue that, contrary to what the Corry court held, the Chaplinsky doctrine allows punishing some private targeted insults even when they do not create an immediate danger of violent response; second, under R.A.V., targeted private insults that work invidious discrimination may be singled out for regulation incidental [*911] to a general prohibition of discrimination in the workplace; and third, subject to qualifications that do not affect the Stanford policy, this latter doctrine applies as well to discrimination in the university.

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n49 For good advice on drafting hate speech regulations in light of R.A.V., see Calleros, supra note 32; Daniel A. Farber, Foreword: Hate Speech After R.A.V., 18 WM. MITCHELL L. REV. 889 (1992); Elena Kagan, Regulation of Hate Speech and Pornography After R.A.V., 60 U. CHI. L. REV. 87 (1993). As these authors suggest, the best strategy is to avoid any reference to racial or other discriminatory content in the definition of the verbal abuse that is to be regulated. Instead, the policy should define the offense purely in terms of the personal characteristics of the victims, or the offender's intent to interfere with the exercise of rights, like the right to equal opportunity in education, housing, or the like. The defendant in R.A.V. was successfully prosecuted under federal civil rights statutes for his cross-burning in the yard of a black

family, and the conviction was sustained against First Amendment challenge using the theory of a threat directed against the exercise of the federal right of equal access to housing. United States v. J.H.H., 22 F.3d 821 (8th Cir. 1994). While the "victim-selection" strategy is quite appropriate, regulations framed along these lines are less speech-protective (because they are more vague and susceptible to discretionary and politically biased enforcement) than the Stanford policy, which restricts punishable speech by the much more objective (though content-based) criterion that it must contain a racial epithet or its equivalent.

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A. Personal Abuse and Public Discourse

Consider a group of white male students who follow an African-American woman student across the campus taunting her with the words "We've never had a nigger." n50 Assume that this is in public, in daylight, and that there is no actual threat of immediate physical attack. Assume also that there is no realistic danger that the woman student will attack her tormentors. Do these assumptions make the conduct into protected free speech?

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n50 This was reported to have occurred on the campus of the University of Wisconsin at Madison during the time the Stanford policy was being considered. A Step Towards Civility: Racial Taunts Banned at University of Wisconsin, TIME, May 1, 1989, at 43.

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In its unanimous Chaplinsky decision in 1942, the Supreme Court spoke of "certain well-defined and narrowly limited classes of speech" that are outside the protection of the First Amendment because their utterance is "no essential part of any exposition of ideas" and of such "slight social value as a step to truth" that they can be prohibited on the basis of "the social interest in order and morality." n51 Along with libel and obscenity, this category was said to include "insulting or 'fighting' words -- those which by their very utterance inflict injury or tend to incite an immediate breach of the peace." n52

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n51 Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942).

n52 Id.

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My view is that extremely abusive private speech targeted to an individual may be sanctioned under this doctrine, even if the individual neither threatens violent response nor reasonably experiences the abusive speech as a "true threat" n53 of physical [*912] harm. The Chaplinsky doctrine makes allowance for the basic "fight or flight" reaction that is the natural human response to hostile aggression, including extreme verbal abuse directed to one's person. Breach of the peace statutes deal with the "fight" response, but people also respond to intimidation and abuse with fear, paralysis, and feelings of

humiliation, often leaving lasting psychic scars. Serious insults can "by their very utterance inflict injury" of this kind, and for this injury the law can provide a remedy. n54

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n53 On the First Amendment requirement of a "true threat," see Watts v. United States, 394 U.S. 705 (1969); United States v. Kelner, 534 F.2d 1020 (2d Cir.), cert. denied, 429 U.S. 1022 (1976); United States v. Baker, 890 F. Supp. 1375 (E.D. Mich. 1995). In the words of the Kelner court:

The purpose and effect of the Watts constitutionally-limited definition of the term 'threat' is to insure that only unequivocal, unconditional and specific expressions of intention immediately to inflict injury may be punished -- only such threats, in short, as are of the same nature as those threats which are . . . 'properly punished every day under statutes prohibiting extortion, blackmail and assault without consideration of First Amendment issues.'

Kelner, 534 F.2d at 1027 (citations omitted).

n54 For the "fight or flight" reading of Chaplinsky, see Thomas C. Grey, Civil Rights vs. Civil Liberties: The Case of Discriminatory Verbal Harassment, 8 SOC. PHIL. & POL. 81, 93 (1991). Cf. KENT GREENAWALT, FIGHTING WORDS 53-55 (1995). Severe emotional distress is generally accepted as legally cognizable injury under the law of torts. See RESTATEMENT (SECOND) OF TORTS @ 46 (1965). Modern civil rights law also accepts that discrimination which imposes no tangible inequality may violate the constitution. See Brown v. Board of Educ., 347 U.S. 483, 493-94 (1954) (describing injury to "hearts and minds"). Richard Delgado was the first to join these two strands of modern American law in his proposal of a tort action for racial verbal assaults. See Richard Delgado, Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling, 17 HARV. C.R.-C.L. L. REV. 133 (1982).

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The Chaplinsky decision has to be read in counterpoint with the Supreme Court's landmark decision a year earlier in Cantwell v. Connecticut. n55 Jesse Cantwell, a Jehovah's Witness, had set up a phonograph on the sidewalk in a Roman Catholic neighborhood and, after first getting their permission, played a record to two passersby attacking the Catholic church in terms that could be expected to offend believers. His listeners responded angrily, and Cantwell was arrested and ultimately convicted for inciting a breach of the peace. In reversing his conviction, the Court held that suppression of speech addressed to the public on matters of public interest could not be justified on the ground that it generated offense or anger in members of the public, though it contained "exaggeration . . . vilification . . . and even . . . false statement." n56

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n55 310 U.S. 296 (1941).

n56 Id. at 309-10.

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The Cantwell Court drew a crucial distinction between expression on matters of public concern ("public discourse") n57 and [*913] "personal abuse" or "profane, indecent, or abusive remarks directed to the person of the hearer." n58 Of the latter the Court said that "resort to epithets or personal abuse is not in any proper sense communication of information or opinion safe-guarded by the Constitution . . ." n59 A year later the Chaplinsky Court relied on these words in affirming a conviction for breach of the peace on the basis of personally targeted "fighting words." n60

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n57 Robert C. Post, The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and Hustler Magazine v. Falwell, 103 HARV. L. REV. 601, 630 (1990).

n58 310 U.S. at 309. The Court stated:

We find in the instant case . . . no personal abuse. On the contrary, we find only an effort to persuade a willing listener to buy a book or to contribute money in the interest of what Cantwell, however misguided others may think him, conceived to be true religion.

In the realm of religious faith, and in that of political belief, sharp differences arise. In both fields the tenets of one man may seem the rankest error to his neighbor . . . . But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy.

Id. at 310.

n59 Id. at 309-10.

n60 Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

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In the decades since Cantwell and Chaplinsky, the Supreme Court has broadened and clarified the protection given to "public discourse." Speech or symbolic expression directed to the public at large can never be punished simply because of the anger or outrage it provokes, n61 either by virtue of its underlying message or its use of profane language ("Fuck the draft") n62 or abuse of revered symbols (flag burning). n63 The cases protect the public speech of students in universities against university discipline as well, n64 and protect the ideas and symbols of extreme [*914] racism when these are used in public discourse. n65 An additional development, which would likely produce a different result in Chaplinsky itself if it were decided today, is that even targeted and personally abusive speech is fully protected when it is also public discourse, n66 and criticism of a police officer carrying out his duties is generally public discourse. n67 If the speech is "public," it can only be punished if it falls within one of the few narrowly defined categories of so-called "unprotected speech," such as obscenity, defamation, incitement to immediate violence, "fighting words" in the narrow sense, or a "true threat." Psychic injury to public officials or public figures, even by way of direct insult, does not justify suppressing public speech.

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n61 See Terminiello v. Chicago, 337 U.S. 1, 4 (1947) (holding free speech serves high purpose even when it stirs people to anger).

n62 See Cohen v. California, 403 U.S. 15, 22-26 (1971) (holding that First and Fourteenth Amendments prohibit state from criminalizing simple public display of expletives).

n63 See Texas v. Johnson, 491 U.S. 397, 404-06 (1989) (holding that flag burning is protected conduct under many conditions).

n64 Papish v. Board of Curators of the Univ. of Mo., 410 U.S. 667 (1973) (holding that student editor could not be expelled for violating "conventions of decency" by publishing cartoon portraying rape of Statue of Liberty and headline reading "Mother Fucker Acquitted").

n65 See United States v. Eichman, 496 U.S. 310, 318 (1990) (protecting "virulent ethnic . . . epithets"); Collin v. Smith, 578 F.2d 1197, 1201-04 (7th Cir.) (striking down ordinances designed to prevent Nazi demonstration in Skokie, IL, home of many Holocaust survivors), cert. denied, 439 U.S. 916 (1978).

n66 See Hustler Magazine v. Falwell, 485 U.S. 46, 50 (1988) (holding that First and Fourteenth Amendments prohibit public figure from suing over "'outrageous' personally insulting advertisement parody").

n67 See City of Houston v. Hill, 482 U.S. 451, 461 (1987); Lewis v. City of New Orleans, 415 U.S. 130, 131-32 (1974); Gooding v. Wilson, 405 U.S. 518, 528 (1972). Chaplinsky himself called the police officer who was arresting him for distributing Jehovah's Witness leaflets a "God damned racketeer" and a "damned fascist." Chaplinsky, 315 U.S. at 569. Justice Powell's concurring opinion in Lewis suggested that the First Amendment should protect what would otherwise be fighting words when addressed to police officers and others in authority. See Lewis, 415 U.S. at 135 (Powell, J., concurring). Justice Powell put this on the ground that police are supposed to be trained to withstand insults and not respond violently. I would add that speech protesting how officials carry out their duties, even very crude and offensive speech, is "public discourse," and can be considered a form of "petition for redress of grievances." Cf. Lawrence, supra note 15, at 453-54 n.92 (arguing that speech which preempts further speech rather than inviting responses does not serve purposes of First Amendment).

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Though the Supreme Court has not sustained a conviction with full opinion under the "fighting or insulting words" doctrine since Chaplinsky, n68 the Court has often restated the doctrine in unqualified terms, n69 and I don't see good grounds to [*915] doubt that the Court would sustain a breach of the peace conviction under a properly drawn statute for a face-to-face barroom insult that is meant to start a brawl and does so. n70 With respect to speech that does not threaten to cause violence but rather to "inflict injury," while the Court continues to quote the whole Chaplinsky formula when reaffirming the doctrine, n71 it has never explicitly discussed the application of this part of it, and some have argued that this aspect of the doctrine has been silently read out

of the law.

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n68 But see Steven H. Shiffrin, Racist Speech, Outsider Jurisprudence, and the Meaning of America, 80 CORNELL L. REV. 43, 49 n.22 (1994) (discussing Lucas v. Arkansas, 423 U.S. 807 (1975)).

n69 See, e.g., Texas v. Johnson, 491 U.S. 397, 409 (1989); Gooding, 405 U.S. at 522-23; Cohen v. California, 403 U.S. 15, 20 (1971).

n70 This branch of the Chaplinsky doctrine is in effect an application of the doctrine of Brandenburg v. Ohio, 395 U.S. 444 (1969), permitting punishment of direct incitement to imminent violence. Contrary to criticisms often made, the doctrine does not imply approval of violence (or "male violence") as a response to provocative speech, any more than the Brandenburg incitement doctrine justifies violence responsive to inciting speech. The inquiry is whether the violence, itself undoubtedly criminal, is foreseeable enough that the speaker (as well as the actor) can be held responsible for it, and imminent enough that "more speech" is not a plausible remedy.

n71 Hustler Magazine v. Falwell, 485 U.S. 46, 56 (1988); Hill, 482 U.S. at 464 n.12; Gooding, 405 U.S. at 522.

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The issue is clearly posed by the question whether tort damages may be awarded against one who (as the formula goes) "by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another," n72 where the "conduct" in question is pure speech, and the emotional distress is caused (and intended to be caused) by the content of the speech. In Hustler Magazine v. Falwell, the Supreme Court answered "no" -- when the speech is public and the plaintiff is a public figure. Hustler reversed an emotional distress judgment for an advertisement parody that portrayed Falwell having sexual intercourse with his drunken mother in an outhouse. The Court held that a form of tort liability that measured speech by whether it was sufficiently "outrageous" could not be applied to "expressions of ideas" criticizing "public men and measures" within "the area of political and social discourse." n73

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n72 RESTATEMENT (SECOND) OF TORTS @ 46 (1965).

n73 Hustler, 485 U.S. at 51-56.

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Robert Post has persuasively argued that the Falwell doctrine does not prevent imposing emotional distress liability for purely private speech. The boundaries of public discourse are not sharp, but some things lie clearly outside them; hence if [*916] Hustler's publisher "had privately mailed the [ad] parody to Falwell's mother, or had telephoned Falwell in the middle of the night to read him the words of the parody . . . no court would classify the speech as public discourse." n74

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n74 Post, supra note 57, at 679.

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If this is right, courts are constitutionally free to award tort damages for emotional distress based on abusive private expression directed from one private individual to another outside of "the area of political and social discourse." And they have done so, especially in cases of verbal abuse using racial epithets. n75 These cases exemplify what the Court meant in Chaplinsky when it spoke of "insulting words" which "by their very utterance inflict injury," and in Cantwell when it placed "personal abuse" outside the full protection of the First Amendment. The exception fits well with general First Amendment theory, which offers extra protection to speech for which "more speech" is an effective remedy; talking back to a personally abusive attack may be dangerous and generally does no good, any more than it would to talk back when someone spits in your face. Further, it protects the right of hearers to be left free of speech that they do not want to hear, in situations where the speaker knows they do not want to hear it and indeed intends to force it on them against their will, and where they are the sole or primary audience for the speech. n76

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n75 See Jean C. Love, Discriminatory Speech and the Tort of Intentional Infliction of Emotional Distress, 47 WASH. & LEE L. REV. 123, 128-35 (1990) (citing cases where plaintiffs sued for racist pure speech on theory of intentional infliction of emotional distress).

n76 This is the principle that lies behind the "captive audience" doctrine. See Rowan v. Post Office Dep't, 397 U.S. 728 (1970). The same principle also explains why it is harassment and not protected speech to pursue someone down the street, or continue telephoning someone, to tell them something after they have made clear they do not want to hear it. For an excellent analysis of the First Amendment issues involved in prohibiting harassment, both generally and in the hate speech context, see Brownstein, supra note 47.

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The "personal abuse" doctrine also justifies the Stanford policy, which is confined to targeted insults that have an objective indicator (use of a racial epithet or equivalent) identifying them as extreme and outrageous in character. The policy departs from the law governing tortious infliction of emotional distress in two respects, both based on a university's responsibility to offer education on reasonably equal terms to its students. First, [*917] the policy did not require a showing that the victim actually suffered severe emotional distress as a result of the abuse. n77 Second, the tort law of emotional distress in most jurisdictions probably would not support a damage award for a single insult using a racial epithet from one peer to another; the cases seem to require some additional factor such as action in addition to speech, sustained abuse over time, or a relationship of responsibility or control between speaker and victim. n78 Again, Stanford's special responsibility to prevent harassment of a student by the cumulative effect of individual acts of abuse justifies this departure.

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n77 The University of Texas discriminatory abuse policy, drafted by Mark Yudof, required an actual showing of severe emotional distress before speech could be punished. UNIVERSITY OF TEXAS, REPORT OF THE PRESIDENT'S AD HOC COMMITTEE ON RACIAL HARASSMENT 4-5 (Nov. 27, 1989) (on file with author) [hereinafter UNIVERSITY OF TEXAS REPORT]. Stanford rejected this limitation, stating: "We think it better in defining a disciplinary offense to focus on the prohibited conduct; we prefer not to require the victims of personal vilification to display their psychic scars in order to establish that an offense has been committed." In this respect Stanford anticipated the Supreme Court's opinion in Harris v. Forklift Systems, Inc., 114 S. Ct. 367 (1993), in which the Court held that a plaintiff need not have suffered severe enough emotional distress to have a tort action in order to make out a hostile environment discrimination case.

n78 Thus, where liability has been imposed for a single incident of verbal abuse, the defendant has stood in an innkeeper-customer or employer-employee relation to the plaintiff. See Love, supra note 75, at 128-35 (describing history of actions brought against verbal abuser using racial and ethnic slurs).

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I will have more to say later about how the university's role as both a workplace for students and a part of the marketplace of ideas should affect its position in the scheme of hostile environment discrimination law. For now, it is enough to establish that the Chaplinsky category of "insulting or 'fighting' words" can apply to incidents of serious personal abuse that do not imminently threaten violence either to or by the addressee.

B. Viewpoint Discrimination

Suppose I am right and a state university could constitutionally prohibit a seriously abusive verbal attack by one student on another, even when the victim posed no likelihood of violent retaliation -- say, someone confined to a wheelchair. Could that university punish an abuser who said "you dirty cripple," and yet [*918] not one who said "your mother is a whore?" The Stanford policy did distinguish between bigoted and other insults, and Justice Scalia's opinion for a five-justice majority in R.A.V. seems at first glance to prohibit this. The court in Corry v. Stanford University read R.A.V. as saying so, but I believe it misapplied Justice Scalia's crucial distinction between laws directed at speech on the one hand, and laws directed at conduct but incidentally sweeping up unprotected speech on the other.

In R.A.V., the Court unanimously struck down as invalid on its face a St. Paul city ordinance that made it a crime to display "a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender." n79 The Minnesota Supreme Court had attempted to save this sweeping prohibition by construing it to apply only to displays or utterances which qualified as "fighting words" under the Chaplinsky line of cases. But in giving its understanding of "fighting words," the court had indicated that the ordinance punished expression that "'by its very utterance' causes 'anger, alarm or resentment.'" Four U.S. Supreme Court Justices thought

this violated the familiar Cantwell principle as it had been developed in the flag-burning cases and many others, and rendered the statute overbroad and invalid. n80

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n79 R.A.V., 505 U.S. at 380.

n80 The Minnesota Court's narrowing construction was a long reach, given the language of the ordinance, and (perhaps as a result) Justice White's opinion was rather strict in scrutinizing the state court's abstract statements construing the ordinance for possible unconstitutional implications. In another case, a federal court might have waited to see if a state court that announced an intention to follow the Chaplinsky doctrine and did not say anything clearly inconsistent with it could successfully enforce its limitations in application.

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But these four sharply dissented from the more sweeping rationale on which the majority of five rested. Justice Scalia's opinion held that even if the ordinance were successfully confined by construction to fighting words in the narrow sense, it was still unconstitutional on its face because it singled out for punishment a subset of fighting words on the basis of their bigoted content -- intolerance on the basis of race, color, creed, religion or gender. This was impermissible viewpoint [*919] discrimination. The fact that "fighting words" were not protected speech did not mean that some of them could be punished on impermissible ideological grounds, grounds unrelated to the reason why fighting words were left unprotected. n81

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n81 R.A.V., 505 U.S. at 393. Justice Scalia starts out as if to impose a broad prohibition on content discrimination, but then makes many and various exceptions to it, the last and most general of which makes clear that viewpoint discrimination is the real target of the doctrine: "Indeed, to validate [content] selectivity (where totally proscribable speech is at issue) it may not even be necessary to identify any particular 'neutral' basis, so long as the nature of the content discrimination is such that there is no realistic possibility that official suppression of ideas is afoot." Id. at 390.

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Though in dissent Justice White argued that it was illogical to give First Amendment protection to unprotected speech, it seems hard to argue with Justice Scalia's general proposition. A statute that allowed damages to be awarded only against libels critical of capitalism would surely be void on its face as an unconstitutional viewpoint discrimination. Ideological selectivity in the imposition of optional legal burdens skews democratic deliberation and the marketplace of ideas toward favored official viewpoints, and as a general matter this is impermissible.

But when this general proposition is applied to anti-discrimination laws, it seems to condemn much existing regulation of (at least) hostile environment discrimination. And yet not long before R.A.V., the Supreme Court had unanimously endorsed the proposition that Title VII, the federal fair

employment law, prohibited discrimination of this kind. n82 The Court knew that this meant enlisting employers to suppress at least some sexually and racially abusive speech; indeed it approvingly cited the EEOC Regulations which prohibited "verbal or physical conduct" that "has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment." n83

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n82 See Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986).

n83 29 C.F.R. @ 1604.11 (1995). See also Meritor Sav. Bank, 477 U.S. at 65. The case law and regulations made clear that hostile environment discrimination on the basis of race, religion, and national origin was equally illegal under Title VII. See 29 C.F.R. @ 1604.11 n.1. Indeed the first case to establish the hostile environment concept was a race discrimination case. See Rogers v. EEOC, 454 F.2d 234 (5th Cir. 1971), cert. denied, 406 U.S. 957 (1972). The regulation speaks of "verbal or physical conduct of a sexual nature," but the italicized words obviously do not apply in a case involving race-based or religion-based harassment. Whether sex-discriminatory harassment that is not of a sexual nature violates Title VII is an interesting question that, luckily, I don't have to answer here.

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[*920] Yet this whole body of law, insofar as it deals with "verbal conduct," would be unconstitutional under an unqualified application of the principle adopted by the R.A.V. majority. Title VII operates to ban abusive or harassing workplace speech used to discriminate on the prohibited bases of sex, race, and the like, but leaves other abusive or harassing speech in the workplace untouched. n84 The St. Paul ordinance had been invalidated for similar selectivity.

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n84 See Browne, supra note 32, at 510-31 (applying First Amendment protections developed for public discourse to employment discrimination law in unqualified form, and consistently reaching conclusion that essentially all Title VII hostile environment regulations treating "verbal abuse" as harassment violate First Amendment).

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Recognizing this, and indeed strongly pressed on the point by Justice White's opinion, Justice Scalia took care to make clear in R.A.V. that Title VII harassment law survived. What he said on this score also exempts the Stanford policy from the operation of the viewpoint discrimination doctrine. His vehicle was a crude but serviceable distinction between speech laws and conduct laws. Title VII, the Court said, is generally aimed at a form of conduct, employment discrimination, that (like many other forms of conduct, up to and including murder) can incidentally be committed by speech. By contrast, the St. Paul ordinance was aimed entirely at expression. n85

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n85 Justice Scalia wrote:

Since words can in some circumstances violate laws directed not against speech but against conduct (a law against treason, for example, is violated by telling the enemy the nation's defense secrets), a particular content-based subcategory of a proscribable class of speech can be swept up incidentally within the reach of a statute directed at conduct rather than speech . . . . Thus, for example, sexually derogatory "fighting words," among other words, may produce a violation of Title VII's general prohibition against sexual discrimination in employment practices.

R.A.V., 505 U.S. at 389.

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As a rough guideline, the distinction between conduct-laws and speech-laws makes sense. If the goal is to get rid of censorship -- i.e., the official imposition of ideological orthodoxy on the marketplace of ideas -- one criterion for a law's benign (non-censoring) purpose is that its main function is unrelated to [*921] ideas as such. If in the neutral application of such a law to a lot of conduct, some low-value or unprotected speech gets regulated on the basis of its content, this suggests that the speech was prohibited for the same (presumptively non-ideological) reason as the action. n86

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n86 Of course the doctrine does not mean that laws aimed generally at conduct can operate to suppress fully protected speech; it is a principle confined to unprotected or low-value speech.

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The distinction the Court made in dictum in R.A.V. between speech-regulating and action-regulating laws became the basis a year later for its holding in Wisconsin v. Mitchell. n87 In Mitchell, the Court unanimously sustained a "hate crime" statute that enhanced penalties when crime victims were selected out of racial and other bias. The Wisconsin Supreme Court had said the victim selection statutes were invalid after R.A.V. because a "legislature cannot criminalize bigoted thought with which it disagrees." n88 The U.S. Supreme Court recognized that the hate crime statute did indeed place extra burdens on those holding the class of disfavored (racist and other discriminatory) beliefs that had been protected in R.A.V. But "whereas the ordinance struck down in R.A.V. was explicitly directed at expression . . . the statute in this case is aimed at conduct unprotected by the First Amendment." n89 Justice Scalia's speech-law versus conduct-law distinction turned out not to be an expedient for R.A.V. only, but a doctrine on which a unanimous Court was prepared to rely.

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n87 508 U.S. 476 (1993).

n88 State v. Mitchell, 485 N.W.2d 807, 815 (Wis. 1992).

n89 Mitchell, 508 U.S. at 487 (citations omitted).

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In his dissent in R.A.V., Justice White pointed out some difficulties with applying a test that turns on whether a law is aimed at speech or action. In the case of Title VII's prohibition on hostile environment discrimination, what was the applicable unit of analysis, the "law" to be categorized as regulating either speech or conduct? If the EEOC hostile environment regulation were considered a separate law, its explicit and extensive concern with speech would be hard to call "incidental". On the other hand, if the unit of analysis was Title VII as a whole, what was to stop the St. Paul authorities from re-enacting their ordinance [*922] with a preamble that associated it with its general public policy (backed by other laws) against discrimination generally?

This is a difficulty, but not an insuperable one in practice, and indeed Justice Scalia's test could have worked in Corry v. Stanford University. The University defended the harassment policy as what it in fact was, the application of a general prohibition of discriminatory conduct. The court found, however, that it was a speech-law -- a Speech Code. "Examination of the Speech Code reveals no mention of conduct or harassment as being proscribed. Rather, what is addressed is the prohibition of a certain category of expression which may result in a breach of the peace. Speech, in this respect, is not swept up incidentally, but is the aim of the proscription." n90

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n90 Corry v. Stanford, No. 740309, slip op., at 13 (Cal. Super. Ct. Santa Clara County Feb. 27, 1995).

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But of course Section 2 of the harassment policy n91 restates the University's general prohibition of discrimination in access to its educational services, and then provides that discriminatory harassment (a form of conduct) violates this prohibition; in this respect it is just like the EEOC Regulation validated in R.A.V. Why did the Corry court ignore the text before its eyes? The court seems to have been impressed by the fact that most of the detailed provisions of the policy, those set out in Sections 4 and 5, concerned speech. Presumably this led it to see the policy not as an anti-discrimination provision but rather as what the plaintiffs called it, a "speech code." So characterized, it fell under the R.A.V. rule rather than the Mitchell exception.

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n91 See infra Appendix.

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Yet most of the behavior prohibited by Stanford's anti-discrimination policy is not speech. The extensive textual attention to speech was intended to assure that very little speech would be affected by the policy, and to clearly define what that speech was. For a reviewing court to use this speech-protective kind of detailed attention as the basis for characterizing the overall policy as a speech code creates a perverse set of incentives for the drafter -- as this drafter can report.

Imagine how easily an anti-harassment policy could be drafted to avoid the Corry court's concern. It would be titled "Stanford University Policy on Nondiscrimination and Harassment" (no [*923] mention of speech). It would repeat the University's general nondiscrimination policy (the first sentence of Section 2 of the actual provision), but omit any mention of the University's policy on free expression (Section 1). It could then recite in some detail the many kinds of conduct that violate the non-discrimination policy -- discrimination in admissions, course availability, grading, student discipline, housing, access to extracurricular activities and the like, finally adding as yet another form of prohibited conduct harassment of students (the substance of the second sentence of Section 2.) Discriminatory harassment would be defined as "conduct that has the purpose or effect of unreasonably interfering with an individual's educational performance or creating an intimidating, hostile, or offensive educational environment on the basis of the individual's sex, race, etc." Sections 3, 4, and 5, with their explicit attention to what speech counts as prohibited harassment, would be omitted. The commentary would focus on examples of prohibited harassment involving physical conduct -- pushing or striking people, defacing or destroying their property.

If anyone asked about verbal abuse, University authorities would simply affirm their commitment to free debate and academic freedom on campus, while stating that of course prohibited conduct can be carried out by words. If they were asked why they had not included any examples of harassment by speech in the commentary, they would say that they meant to emphasize that the policies were aimed at conduct, not at expression, adding some flourish like: "We do not contemplate that the policy will have to be applied to verbal conduct. This University, unlike some others, does not believe in speech codes and will never have one."

Given the standard implicit in the Corry court's opinion, this would have been a much better strategy for litigation purposes, especially in a case litigated in the abstract form that the Leonard Law's broad standing provision made possible -- which is to say in the absence of any actual application of the policy. The Stanford lawyers could have easily shown the judge that the regulation, especially in light of the accompanying statements of University officials, was simply a regulation of discriminatory action. Its text made no mention of speech, and any possible [*924] application to discriminatory speech, when that constituted the kind of conduct prohibited by the policy, was minor and incidental. A policy drafted in these terms would have clearly come within the exception for conduct-laws made in R.A.V. and confirmed in Mitchell.

But it would have been less protective of free speech on campus than the actual policy. This is because a prohibition of discriminatory harassment in general terms, without further definition of what this meant for speech, would be more likely to chill debate. Suppose this scenario: a student's habit of loudly proclaiming his admiration for The Bell Curve around the dormitory becomes the target of protest by African-American students, who say it is aimed at (and certainly has the effect of) making them feel unwelcome in the university and making it more difficult for them to do their work. He refuses to stop, and the dispute gets in the campus newspaper, which quotes the offending student as saying that he has no intention of letting "a bunch of affirmative-action morons" silence him, and that he hopes "what I'm saying will get some of them to think about whether they are really qualified to be here." Organized African-American students, along with many other students who support the University's efforts to attract and retain a diverse student body, now

demand that he be disciplined for violation of the anti-harassment policy. Publicity on the incident starts to spread across the country, and word filters back from admissions recruiters that it is making a number of promising African-American admittees look elsewhere.

Under the Stanford policy that was invalidated, the result would be clear: the white student could be freely criticized, but he would not be in violation of University disciplinary standards. No racial epithet or its equivalent had been addressed to a targeted individual. Under the alternative policy I have hypothesized as better likely to survive court challenge after Corry, the outcome is by no means so clear. Yes, the University is committed to free speech; but it is also committed to preventing racial harassment. The terms of the anti-harassment policy seem to apply to the white student; he has admitted that he intends his statements to make living and working on campus more difficult for African-American students, and they say that he is succeeding. Many cases could be cited from employment law where [*925] racially or sexually offensive expression, even though not targeted to an individual, was treated as harassing conduct. n92 In these circumstances, a university spokesperson eager to get the case out of the newspapers might tell the white student that he is in jeopardy of disciplinary charges and would be well advised to stop his public preaching of doctrines of racial inequality.

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n92 See, e.g., Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486 (M.D. Fla. 1991).

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The point is that the test of whether a regulation is mainly a regulation of speech or one of conduct should not be how much the regulation and its supporting material talks about speech as compared to other kinds of conduct. The protection of speech from over-regulation typically requires careful definition of exactly what speech can be captured within a category of conduct. This is why the Stanford policy should have been upheld under the R.A.V.-Mitchell test. Its detailed focus on the small part of Stanford's anti-discrimination effort that concerned ideologically charged expression was the result of special concern to protect free speech on campus against what otherwise is the potentially chilling vagueness of the now-standard concept of hostile environment discrimination.

C. Hostile Environment Discrimination and the University

The Supreme Court has pretty clearly approved the general outlines of Title VII's prohibition of hostile environment discrimination, while showing its full awareness that this is a government mandate to employers to regulate their employees' speech in a content-specific way. n93 I have argued that this supports the Stanford policy, which like the Title VII regulation involves the application to speech of a general prohibition of discriminatory action. But the Court has not yet approved [*926] hostile environment regulation in universities, and a number of lower courts have refused to do so, striking down university regulations as "campus speech codes" and distinguishing them from similar regulations in the employment area. n94 Although these decisions fail to explain why harassment law should not extend by analogy to the university, n95 they reveal a growing judicial consensus that anti-harassment regulation in

employment and education differ significantly for First Amendment purposes.

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n93 R.A.V., 505 U.S. at 389. Cf. Harris v. Forklift Sys., Inc., 114 S. Ct. 367 (1993); supra note 24. In the lower courts, some of the more far-ranging uses of the hostile environment concept to suppress offensive workplace speech are beginning to be found to violate either the First Amendment or a construction of Title VII animated by concerns for free expression. See, e.g., DeAngelis v. El Paso Mun. Police Officers Ass'n, 51 F.3d 59 (5th Cir. 1995); Johnson v. Los Angeles Fire Dep't, 865 F. Supp. 1430 (C.D. Cal. 1994). I expect the Supreme Court to confirm this reining in of the concept, but not to repudiate the basic validation of workplace hostile environment law found in R.A.V. and Harris.

n94 See Iota Xi Chapter of Sigma Chi Fraternity v. George Mason Univ., 993 F.2d 386 (4th Cir. 1993); UWM Post, Inc. v. University of Wis., 774 F. Supp. 1163 (E.D. Wis. 1991); Doe v. University of Mich., 721 F. Supp. 852 (E.D. Mich. 1989). Iota Xi did not involve a regulation, but the University's suspension of a fraternity chapter for public performance of a racist and sexist skit on the grounds that it tended to create a "hostile learning environment for women and blacks, incompatible with the University's mission." Iota Xi, 993 F.2d at 388. See also Dambrot v. Central Mich. Univ., 839 F. Supp. 477 (E.D. Mich. 1993).

n95 This is particularly stark in UWM Post, where the court struck down a regulation that was confined to targeted discriminatory speech intended to render the educational environment hostile. Its long opinion addressed the Title VII analogy only with the unilluminating observation that "Title VII addresses employment, not educational, settings." UWM Post, 774 F. Supp. at 1177. It went on to say that in any event because "Title VII is only a statute, it cannot supersede the requirements of the First Amendment," id., suggesting that it may actually have regarded Title VII hostile environment law as unconstitutional. A year later in R.A.V., the Supreme Court went out of its way to affirm the constitutionality of the Title VII harassment regulations. R.A.V., 505 U.S. at 389.

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There are indeed important differences between the two, which should serve to limit but not block the application of harassment law developed in the employment area to student speech. The first important difference is that, as Mary Becker points out in this symposium, speech at work is not all that free. n96 By definition, employment involves subjecting oneself to another person's business purposes, and allows extensive control over what employees say on the job. The point extends to public employers as well; the government has broader powers as an employer to regulate its employees' speech than it does as sover-eign to regulate the speech of its citizens. The state as employer may discipline or dismiss employees for speech that demonstrates unfitness for the job or interferes with it even in relatively intangible ways, without much restraint from the usual prohibitions against content-specific and even viewpoint-specific regulation. n97

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n96 Becker, supra note 38, at 817-18, 842-68.

n97 See, e.g., Connick v. Myers, 461 U.S. 138 (1983). There are good arguments for more First Amendment protection of the speech of public workers against discipline. See, e.g., Toni M. Massaro, Significant Silences: Freedom of Speech in the Public Sector Work Force, 61 S. CAL. L. REV. 1 (1987). But even with the most stringent practicable protection, employers could discipline or dismiss employees for a wide range of speech that could never be made criminal or tortious under the First Amendment.

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[*927] In theory, the state as sovereign does not have such broad powers over speech in the private workplace, but in practice its powers are still quite extensive. Collective bargaining law permits sweeping restriction on both employee and worker speech in its regulation of elections and organizing campaigns. n98 Anti-discrimination legislation like Title VII cannot of course regulate private employees' speech in the interests of "getting the job done" as such. But it can require employers to regulate the workplace so that employees do not find getting their jobs done more difficult by virtue of their religion, race, sex, or national origin. n99 Given the pervasive supervision of employee speech in pursuit of both employee morale and general work discipline that is customary in employment, the power to prohibit private discrimination leaves government a relatively wide scope in its regulatory pursuit of an equal opportunity private workplace. n100

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n98 Employer speech can be sanctioned as "threatening" when it could never be considered a regulable "true threat" in other contexts, and secondary boycott law imposes viewpoint-specific restrictions on labor picketing of businesses other than the employer. See Becker, supra note 38, at 843-44.

n99 See Harris v. Forklift Sys., Inc., 114 S. Ct. 367, 372 (1993) (Ginsburg, J., concurring).

n100 See Becker, supra note 38, at 817; Fallon, supra note 24, at 12. For the more restrictive view that workplace harassment law should incorporate a targeting requirement for speech, see Nadine Strossen, Regulating Workplace Sexual Harassment and Upholding the First Amendment -- Avoiding a Collision, 37 VILL. L. REV. 757, 777-82 (1992) and Eugene Volokh, Freedom of Speech and Workplace Harassment, 39 UCLA L. REV. 1791, 1843-47 (1992).

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Education is another area where the state has extensive powers to impose content-specific speech regulation which would be quite unacceptable if imposed on the general citizenry through criminal or tort law. n101 This is true at all levels for regulation of student speech within the curricular setting, and in public primary and secondary schools speech may also be regulated to [*928] inculcate pupils with community norms of civility and decorum. High school administrators can discipline a student for a sexually suggestive speech to a student assembly, n102 and censor a newspaper for language that would be protected outside the school setting. n103 Under these decisions, school officials could clearly stop a high school newspaper from printing racial

slurs or discipline a drama club for performing a sexually demeaning skit on school property. The justification would be frankly view-point-specific -- the school's mission to teach civic values, including racial and gender tolerance.

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n101 Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 509 (1969) (recognizing comprehensive authority of schools to control student activities that "would materially and substantially disrupt the work and discipline of the school," while affirming students' First Amendment right to wear armbands in protest of Vietnam War).

n102 Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 685 (1986).

n103 Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988).

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The educational mission of universities also permits extensive content-specific regulation of student speech in the form of the grading and other evaluation of curricular work. On the other hand, the courts have come to treat the public university as constitutionally committed to the pursuit of truth through free inquiry. Public universities' control over student life has in consequence been subordinated to those aspects of First Amendment law that are most directly based on the concept of the free marketplace of ideas. So a state university, unlike a high school, cannot punish a student editor for publishing headlines and cartoons that violate "conventions of decency;" n104 the First Amendment protects most extra-curricular student expression on campus, and precludes censorship that is ideological, parental, or even pedagogical in nature. n105 There are arguments to be made in favor of allowing more regulation of extra-curricular student speech by state universities in pursuit of educational goals. n106 But the case law presses the other way, forbidding universities [*929] from screening out bad ideologies -- whether unpatriotic, anti-democratic, or racist and sexist -- on the ground that these will infect the minds of students. n107 Because universities have no more than general governmental regulatory power over student speech, absent a showing that the strictly educational mission of the university requires additional authority, university anti-harassment regulations should be generally confined to prohibiting speech that falls outside the First Amendment's full protection.

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n104 Papish v. Board of Curators of the Univ. of Mo., 410 U.S. 667 (1973).

n105 Rosenberger v. Rector of the Univ. of Va., 115 S. Ct. 2510, 2520 (1995); Healy v. James, 408 U.S. 169, 169-70 (1972).

n106 Mary Becker has argued that because of the extensive content-based regulation of speech that makes up the core academic function of the university, it is arbitrary for courts to prevent universities from excluding student speech that they judge to be unacceptably racist or sexist. Mary Becker, Conservative Free Speech and the Uneasy Case for Judicial Review, 64 U. COLO. L. REV. 975, 1030-46 (1995). Peter Byrne also argues for allowing universities broader discretion than is allowed by decisions like Healy and Papish to pursue educational aims through the regulation of extra-curricular speech. J. Peter

Byrne, Racial Insults and Free Speech Within the University, 79 GEO. L.J. 399, 434 (1991). There seems to be much more of a case for allowing private institutions to make judgments about which viewpoints will be heard. California's Leonard Law makes this allowance to religious institutions, but not to other private ones; the latter judgment seems too restrictive.

n107 Robert C. Post, Racist Speech, Democracy, and the First Amendment, 32 WM. & MARY L. REV. 267, 317-25 (1991). Professor Post usefully distinguishes among "civic", "democratic," and "critical" models of education, generally favoring the last of these for universities. Id. The "civic" model would permit speech regulation in the name of virtue and good taste, and the "democratic" model would treat the campus as a full-fledged public forum, while the "critical" model sees the university as a limited-purpose public forum dedicated to the critical pursuit of truth.

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This would still allow the prohibition of the kind of targeted "personal abuse" that, as I have argued, comes within the Cantwell-Chaplinsky doctrine. Universities, moreover, need not confine themselves to prohibiting speech that threatens breach of the peace or tortiously inflicts severe emotional distress. Because of their constitutionally recognized mandate to "exclude . . . First Amendment activities that . . . substantially interfere with the opportunity of other students to obtain an education," n108 universities should be free to punish some private insults which, though lacking full constitutional protection, are not generally criminal or tortious. Finally, it is a reasonable presumption that insults reflecting group bias are most likely to cumulate so as to substantially interfere with student work, so that universities may prohibit these without banning all abusive individual insults.

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n108 Widmar v. Vincent, 454 U.S. 263, 277 (1981) (citing Healy v. James, 408 U.S. 169, 188-89 (1972)).

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These principles support a number of the recent campus speech decisions. The regulations that broadly prohibited speech tending to create a hostile environment for students of color or women students did lend themselves to a regime of ideological censorship, and have rightly been invalidated. n109 By contrast, [*930] the decisions in the Wisconsin and Stanford cases struck down regulations that prohibited only targeted and severely insulting discriminatory speech that falls outside the sphere of campus public discourse; n110 these were based on too narrow a view of both the Chaplinsky doctrine and the implications of R.A.V. n111 Similarly, the regulations now in place in the University of California system and at the University of Texas, respectively confined to targeted speech that constitutes fighting words and intentional infliction of emotional distress, should likewise be upheld against First Amendment challenge. n112

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n109 See Iota Xi Chapter of Sigma Chi Fraternity v. George Mason Univ., 993 F.2d 386, 393 (4th Cir. 1993); Dambrot v. Central Mich. Univ., 839 F. Supp.

477, 490 (E.D. Mich. 1993); Doe v. University of Mich., 721 F. Supp. 852, 868 (E.D. Mich. 1989).

n110 See UWM Post, Inc. v. University of Wis., 774 F. Supp. 1163, 1178 (E.D. Wis. 1991); Corry v. Stanford, No. 740309, slip op., at 13 (Cal. Super. Ct. Santa Clara County Feb. 27, 1995).

n111 UWM Post, 774 F. Supp. at 1178. The Wisconsin rules were broader than the Stanford policy; they prohibited targeted "racist or discriminatory comments, epithets or other expressive behavior" that intentionally "demean the race, sex, religion, color, creed, disability, sexual orientation, national origin, ancestry or age of the individual or individuals; and create an intimidating, hostile or demeaning environment for education, university-related work, or other university-authorized activity." Id. at 1165. But the university lawyers offered to narrow the reach of the rules by construction to, in effect, racial epithets and their equivalents, and the judge held that even this would have been overbroad, as it was not confined to "fighting words" in the narrow sense. Id. at 1178.

n112 UNIVERSITY OF TEXAS REPORT, supra note 77; UNIVERSITY OF CALIFORNIA, POLICIES APPLYING TO CAMPUS ACTIVITIES, ORGANIZATIONS, AND STUDENTS @ 102.11 (August 15, 1994) (stating University of California harassment policy).

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Federal civil rights statutes prohibit recipients of federal funds from discriminating on grounds of race, national origin, sex, or handicap. The principles just sketched would allow the universities to meet their responsibilities under these laws to protect students against discriminatory harassment, including verbal abuse, on grounds of race and sex. The early cases decided under Titles VI and IX (none of which involve universities) suggest that the hostile environment concept will indeed be applied within education, using the definitions developed within employment law as a presumptive guide. n113 The Department of Education internal guidelines for Title VI enforcement, issued in 1994, contemplate the enforcement of such an obligation, though in my view those guidelines should give some definition to the speech that they require to be regulated. n114 Given the [*931] likely direction of this body of law, universities cannot safely declare themselves free-fire zones for the imposition of racial and other discriminatory abuse by students on other students.

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n113 See supra note 25.

n114 Racial Incidents and Harassment Against Students at Educational Institutionals: Investigative Guidance, 59 Fed. Reg. 11448 (Mar. 10, 1994). The Regulation provides that "the existence of a racially hostile environment that is created, encouraged, accepted, tolerated or left uncorrected by a recipient also constitutes different treatment on the basis of race in violation of Title VI." Id. Further, the Regulation states that such an environment may be created by "harassing conduct (e.g., physical, verbal, graphic, or written) that is sufficiently severe, pervasive or persistent so as to interfere with or limit the ability of an individual to participate in or benefit from the services, activities or privileges provided by a recipient." Id. at 11449 (emphasis added). Footnote one indicates that Title VI is "directed at conduct that

constitutes race discrimination . . . and not at the content of speech," and states that "in cases in which verbal statements or other forms of expression are involved, consideration will be given to any implications of the First Amendment to the United States Constitution. In such cases, regional staff will consult with headquarters." Id. at 11448 n.1. A later footnote adds that the Department "cannot endorse or prescribe speech or conduct codes or other campus policies to the extent that they violate the First Amendment to the United States Constitution," but there is no attempt to say what verbal, graphic, or written conduct must be prohibited in order to comply with the guidelines. Id. at 11450 n.7. The virtually unguided discretion the Regulation grants to the Department's Office of Civil Rights gives rise to a powerful vagueness challenge to Title VI insofar as it prohibits hostile environment discrimination in universities.

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The main point, though, is not that universities risk lawsuits if they fail to prohibit targeted racial abuse. After all, they clearly risk lawsuits if they do institute such prohibitions. The main point is that if an African-American student at an American university has to walk through a hailstorm of "Nigger!" to get to class or to the library and the university takes no action to stop this, it is violating its moral responsibility to protect that student's right to equal access to its educational services without discrimination on the basis of race. That is why the Stanford policy should have been upheld in the Corry case.

IV. HEARTS AND MINDS

I have argued that the Stanford policy should have survived R.A.V. v. City of St. Paul on the basis of Justice Scalia's distinction between speech laws and conduct laws. But I don't think R.A.V. represents a good accommodation between the competing rights on the contested legal terrain of hate speech. n115 The decision [*932] invalidates laws against discriminatory and unprotected speech that should survive First Amendment scrutiny.

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n115 For similar criticisms of R.A.V., see Akhil R. Amar, The Case of the Missing Amendments: R.A.V. v. City of St. Paul, 106 HARV L. REV 124 (1992); Cass R. Sunstein, Words, Conduct, Caste, 60 U. CHI. L. REV. 795 (1993).

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An example of a law that seems clearly invalid under R.A.V. but in my opinion shouldn't be is the special tort cause of action for targeted racial insults proposed by Richard Delgado. n116 Professor Delgado would make a single episode of serious verbal racial abuse tortious, whereas the current common law of intentional infliction of emotional distress typically requires something more than a single speech-act -- a relationship of authority or control between speaker and victim, or a persistence in verbal abuse, or additional conduct. The idea behind the Delgado tort is that targeted private abuse is unprotected speech under Chaplinsky, and that the state can reasonably single out racially oriented abuse as particularly likely to inflict significant emotional distress in a single episode.

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n116 Delgado, supra note 54, at 179-81. This is the seminal article in the development of a synthesis of free speech and equal opportunity law that focuses on targeted hate speech. In addition, see Donald A. Downs, Skokie Revisited: Hate Group Speech and the First Amendment, 60 NOTRE DAME L. REV. 629, 651-66 (1985) (distinguishing targeted speech).

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Another and even clearer example of a legal development that should be constitutional but seems clearly invalid under R.A.V. is the tort action for racial intimidation proposed by John Nockleby. n117 Threats are a recognized category of unprotected speech, similar in that respect to fighting words. As with the closely related category of personally abusive insults, the law typically does not treat all threats as crimes or even torts; rather some additional element is normally required -- either some further and imminently threatening action, as under the common law of assault; or a manifested intent to extract some benefit by threat, as under the law of extortion; or the use of some particular medium, such as the mails or the telephone. n118 A federal statute does make threats against the life of the President of the United States criminal. Professor Nockleby's proposal [*933] would likewise make simple threats tortious if they were motivated by racial animus, while leaving otherwise similar threats made from other motives not subject to liability.

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n117 See John T. Nockleby, Hate Speech in Context: The Case of Verbal Threats, 42 BUFF. L. REV. 653 (1994). The proposed tort allows damage recovery for a threat "motivated by racial animus." Id. at 700. The example is clearer than that of the Delgado tort because it is universally agreed that threats are unprotected speech, whereas this is controversial with respect to targeted "personal abuse."

n118 Id. at 700 n.167.

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This proposal cannot be justified under the distinction between speech-laws and conduct- laws made in R.A.V. and Mitchell; no one could say of an anti-threat law that its regulation of speech was "only incidental." Of course the statute prohibiting threats against the President is also a content-specific speech law. The R.A.V. Court said it was nonetheless constitutional because "the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable." That is, "the reasons why threats of violence are outside the First Amendment (protecting individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur) have special force when applied to the person of the President." In these circumstances "no significant danger of idea or viewpoint discrimination exists. Such a reason, having been adjudged neutral enough to support exclusion of the entire class of speech from First Amendment protection, is also neutral enough to form the basis of distinction within the class." n119

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n119 R.A.V., 505 U.S. at 388. The phrase "neutral enough" conceals a multitude of sins. Many of the categories of unprotected or low value speech are designated as such on the basis of evaluation of the messages they are likely to carry. Consider the varying treatment of political speech, high art, commercial advertising, sexually explicit popular entertainment, ordinary obscenity, and child pornography, to name just a few of the content-based categories recognized in the case law.

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At first glance, it would seem that Professor Nockleby's proposed tort of racial intimidation could be defended on the same grounds as the presidential threat statute. Given the nature of group bias, it seems plausible to suppose that group-based threats are particularly likely to induce fear in their targets, cause more of the disruption that fear engenders (because the fear will be felt by other members of the same racial group as well), and are especially likely to be carried out. n120 But this rationale [*934] would also justify the ordinance against group-based fighting words struck down in R.A.V. One of things that provokes people to fight is fear, and if bigoted insults provoke more fear than other insults generally, they also create more danger of violent response. The Court in R.A.V. anticipated this argument, and ruled it out on the ground that "the only reason why such expressive conduct would be especially correlated with violence is that it conveys a particularly odious message." The increased violence rationale could not prevail because it would still be the case that "the St. Paul ordinance regulates on the basis of the 'primary' effect of the speech -- i.e., its persuasive (or repellant) force." n121

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n120 In Mitchell, the Court noted:

The Wisconsin statute singles out for enhancement bias-inspired conduct because this conduct is thought to inflict greater individual and societal harm. For example, according to the State and its amici, bias-motivated crimes are more likely to provoke retaliatory crimes, inflict distinct emotional harms on their victims, and incite community unrest . . . . The State's desire to redress these perceived harms provides an adequate explanation for its penalty-enhancement provision over and above mere disagreement with offenders' beliefs or biases.

Wisconsin v. Mitchell, 508 U.S. 476, 487-88 (1993). The Court is evidently applying only rational basis review to the factual underpinnings of the claim -- as it had in validating the threat against the President statute in R.A.V.

n121 R.A.V., 505 U.S. at 394 n.7.

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So even a plausible showing that racist fighting words were clearly more likely to cause fights than other fighting words would not justify singling them out under an anti-violence statute -- because this neutral justification could too easily be used to cover a legislative motive to punish them for ideological reasons. And this prophylactic prohibition is likewise fatal to Professor Nockleby's proposed tort action for racial threats. Yes, racial threats may in

general arouse more fear than other threats, but if so this is because they summon up in hearers' minds the history and experience that make racial threats special -- the history of slavery, lynchings, race riots, and the contemporary urban racial tinder box. This history is ideologically charged, and psychic effects that are mediated through ideas in this way cannot, under R.A.V., be treated as a ground for special legal intervention consistent with the viewpoint neutrality required by the First Amendment.

The same hyperbolic concern with ideological neutrality also appears in the Court's justification for the key distinction between laws aimed speech and laws that while aimed at conduct sweep up some speech. "Where the government does not target [*935] conduct on the basis of its expressive content, acts are not shielded from regulation merely because they express a discriminatory idea or philosophy." n122 This is the distinction that preserves Title VII hostile environment law from invalidation as mainly a conduct-regulation, and as such not targeted at expressive content.

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n122 Id. at 390.

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But here we can see the central flaw of R.A.V. in its application to civil rights law. The fact is that while discrimination is conduct, we prohibit it partly because of its "expressive content," because of the message of group inferiority it sends. We call the forms of discrimination prohibited under civil rights laws "invidious," and the very name makes the point, which has been embedded in anti-discrimination doctrine from the beginning. One of the first important decisions construing the Equal Protection Clause invalidated a statute excluding black people from juries because it was "unfriendly . . . against them distinctly as colored," and so worked a discrimination wrongful because "implying inferiority in civil society." n123 The point became central in the segregation cases. Even with equal facilities, Jim Crow was unconstitutional because it rested on a premise of white supremacy; by delivering this message, segregating black children into separate schools "generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." n124 Similarly, the laws preventing racial intermarriage were racially discriminatory, even though their burdens fell with formal equality on white and black alike. Why? Because the purposes behind the law, to preserve "racial integrity" and prevent "a mongrel breed," were so [*936] obviously "an endorsement of the doctrine of White Supremacy." n125

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n123 Strauder v. West Va., 100 U.S. 303, 308 (1880).

n124 Brown v. Board of Educ., 347 U.S. 483, 494 (1954). Any notion that it was not the psychic injury or "feeling of inferiority" that was the relevant injury, but rather the deficit in education thought to flow from it, was dispelled in the post-Brown cases which invalidated separate but equal segregation for facilities like parks and beaches. In those cases, the only plausible injury that could justify the constitutionally required finding of inequality was the psychic one. See Gayle v. Browder, 352 U.S. 903 (1956)

(buses); Holmes v. City of Atlanta, 350 U.S. 879 (1955) (municipal golf courses); Mayor of Baltimore v. Dawson, 350 U.S. 877 (1955) (public beaches and bathhouses).

n125 Loving v. Virginia, 388 U.S. 1, 7 (1967).

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The condemnation of race discrimination for imposing stigmatic injury does not merely apply to the actions of governments, which of course have no First Amendment rights. Separate-but-equal segregation is also prohibited to private suppliers of housing, employment, education, and public accommodations under the various state and federal civil rights acts. Under the 1964 Civil Rights Act, a restaurant could not maintain separate "white" and "colored" service areas, even if these were entirely equal and maintained solely in symbolic affirmation of the traditional Southern way of life. The same result would certainly apply under fair housing laws to an apartment owner who wanted to maintain white and colored sides to an apartment complex, or under employment discrimination laws to an employer who wanted to segregate his work force by race while providing equal wages and working conditions. What is the unequal treatment here, unless the law takes account of the stigma imposed on the black tenants and employees by the message?

Civil rights statutes can suppress not only "expressive segregation" but even pure speech in the interest of preventing the psychic and stigmatic injury flowing from discrimination. The maintenance of "white" and "colored" signs to designate different parts of the restaurant are illegal n126 even if the restaurant owner is willing to serve black customers who ask to be served in the part designated "white." n127 Similar prohibitions could be applied, consistent with the First Amendment, to a landlord or employer who wanted as a last resort to retain only the symbols of segregation -- say, "white" and "colored" signs over separate entrances to the workplace or the apartment building, even without any further effort to enforce the old ways.

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n126 See, e.g., United States v. Boyd, 327 F. Supp. 998, 1005-06 (S.D. Ga. 1971) (ordering recalcitrant restaurateur to post specific signs designating both front, formerly white, and back, formerly black, as available to all customers without respect to race).

n127 See Lawrence, supra note 15, at 442 n.50 (giving example of segregatory signs over separate entrances at diner in Georgia). I believe Professor Lawrence was the first to emphasize the connection between the "stigma" theme in basic civil rights law and the hate speech issue.

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[*937] Unusual cases like these, where stigma creates the only inequality, are useful in showing that civil rights law recognizes the injury inflicted by the message of caste. In these marginal cases, stigma is the only injury. Of course in reality, stigmatic injury is almost always closely intertwined with the imposition of material inequality. The one justifies the other (they are less than us, so we need not accord them the same benefits) and then returns in a vicious feedback loop (look how they live; it proves they are less than us).

It would be a great mistake to say that civil rights law is concerned solely with stigma -- a policy meant to deprive black people of jobs, housing, and other material benefits is illegal even if it is effectively concealed.

During the school desegregation litigation, it became an important constitutional fiction to posit that the separate schools provided for black and white children were materially equal, although they never were, because if material inequality had to be proved school district by school district, massive resistance could have kept legalized segregation in place forever. As a result, we now have firmly planted in our formal legal doctrine the basic human point that bigotry works much of its evil on the hearts and minds of its victims by the messages it sends and continually reinforces.

Historically, however, there have been few cases since the fall of Jim Crow in which a discrimination plaintiff has needed to rely on stigmatic injury alone to make a case. In addition, the disputes over affirmative action have come to the center of civil rights law, and those who would argue for a "color-blind constitution" naturally prefer not to stress the importance of stigmatic injury in anti-discrimination law, as its incidence is so obviously asymmetrical. But the first Justice Harlan, who framed the colorblind slogan, also pointed that segregation is unequal because of what it proclaims: that "colored people are so inferior and degraded that they cannot be allowed to sit in public coaches occupied by white citizens." n128 Our constitutional law should remember these words. The majority opinion in R.A.V. v. St. Paul forgets them.

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n128 Plessy v. Ferguson, 163 U.S. 537, 560 (1896) (Harlan, J., dissenting).

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Justice Stevens in his separate opinion in R.A.V. argued that a prohibition of discriminatory fighting words was not viewpoint-based, [*938] as the majority concluded, but injury-based. n129 Justice Scalia said this was "wordplay;" bigoted fighting words inflicted "anger, fear, sense of dishonor, etc.," and all that distinguished this from the injury produced by other fighting words was "the fact that it is caused by a distinctive idea, conveyed by a distinctive message" n130 - the message of white supremacy.

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n129 Justice Stevens stated:

The St. Paul ordinance regulates speech not on the basis of its subject matter or the viewpoint expressed, but rather on the basis of the harm the speech causes. . . . In this regard, the ordinance resembles the child pornography law at issue in Ferber, which in effect singled out child pornography because those publications caused far greater harms than pornography involving adults.

R.A.V., 505 U.S. at 433-34.

n130 Id. at 392-93.

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Yes. But the special nature of the "anger, fear, sense of dishonor, etc." done by that bigoted "distinctive message" is recognized throughout civil rights law. If the First Amendment makes treating it as a legally cognizable injury an unconstitutional basis for governmental action, it undoes far more of our legal effort to overcome the legacy of racism and other forms of prejudice than the opinion in R.A.V. lets on.

To point this out is only to start the process of accommodating free speech and anti-discrimination principles. If everything that conveyed a stigmatic message against members of groups subject to prejudice could be treated as unlawful discrimination, there wouldn't be much freedom to speak on some of the central contested issues in our politics. But we have to begin by recognizing that the clash is between human rights of the first magnitude, free speech and equality, and then move on to try and find a truce line that respects both of them. n131

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n131 For a particularly good discussion of the importance of explicit recognition that resolution of the issue requires accommodation of conflicting rights, see Toni M. Massaro, Equality and Freedom of Expression: The Hate Speech Dilemma, 32 WM. & MARY L. REV. 211 (1991).

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The treatment of hate speech by other liberal democracies may lend some perspective. Most of them have accepted as consistent with free expression general criminal prohibitions against promulgating doctrines of racial hatred and persecution. Actually, this has been our own approach until recently, under Beauharnais v. Illinois, n132 still not formally overruled. An international [*939] human rights convention requires signatories to prohibit racial hate speech as a basic protection for racial minorities, n133 and Canada has recently held such a law constitutional. n134 Mari Matsuda has ably argued that we should in effect retain Beauharnais and recognize an explicit First Amendment exception for racial hate speech. n135 On the related issue of pornography regulation, there have been forceful arguments for a general ban on at least violent pornography as a form of hate speech against women; n136 and again Canada has adopted a version of this approach. n137

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n132 343 U.S. 250 (1952). Though it has never been formally overruled, Beauharnais is generally no longer considered good law. See American Booksellers Ass'n, v. Hudnut, 771 F.2d 323, 331 n.3 (7th Cir. 1985); Collin v. Smith, 578 F.2d 1197, 1204 (7th Cir. 1978).

n133 International Convention on the Elimination of All Forms of Racial Discrimination; opened for signature Mar. 7, 1966, 660 U.N.T.S. 195. See also Mari J. Matsuda, Public Response to Racist Speech: Considering the Victim's Story, 87 MICH. L. REV. 2320, 2341-46 (1989).

n134 See Regina v. Keegstra, 3 S.C.R. 697 (1990); GREENAWALT, supra note 54, at 64-70.

n135 Matsuda, supra note 133, at 2348-56. Steven Shiffrin argues to the same effect in the wake of R.A.V. See Shiffrin, supra note 68, at 67-68, 81-84.

n136 See ANDREA DWORKIN & CATHARINE A. MacKINNON, PORNOGRAPHY AND CIVIL RIGHTS: A NEW DAY FOR WOMEN'S EQUALITY (1988).

n137 See GREENAWALT, supra note 54, at 113-23 for an account of the Canadian approach.

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I've been persuaded by the arguments for extending to hate speech the perhaps quixotic (and certainly internationally deviant) American faith that "more speech" is the better remedy than suppression for forms of speech that can in some practical way be countered by argument. n138 But given the practices of other liberal societies, it doesn't seem to me that this should be an easy and confident conclusion -- especially given that the costs of our regime of cultural laissez-faire are not borne equally or randomly, but fall disproportionately on those already suffering from discrimination and prejudice. Indeed the practical operation of giving full protection to hate speech may be to [*940] exclude many people from the full civic participation that it is one of the aims of the First Amendment to promote. n139

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n138 The premise is not that good arguments will necessarily win out, libertarian classics to the contrary notwithstanding, but rather that we are willing to bet on argument in the absence of proof -- the leap of faith whose perilous nature Holmes stressed in the Abrams dissent, Abrams v. United States, 250 U.S. 616, 630 (1919). The certitude of First Amendment true believers who are sure that hate speech regulation must do much harm and little good is inconsistent with this attitude. See Frederick Schauer, The First Amendment as Ideology, 33 WM. & MARY L. REV. 853, 869 (1992).

n139 My resolution of the hate speech dilemma, set out previously in Grey, supra note 54, is criticized as failing to take adequate account of the equality side in john powell, Worlds Apart: Reconciling Freedom of Speech and Equality 98-99 (unpublished manuscript, on file with author). Professor powell, drawing on the writings of Jurgen Habermas, argues that both free speech and equality values are founded in a more basic value of participation, and that hate speech regulations should be evaluated in terms of whether they advance or retard citizen participation.

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In any event, targeted personal abuse is not readily dealt with by more speech, and the concentration of its burdens justifies lowering the legal threshold of harm required by each incident of it. As I understand it, R.A.V. would invalidate the moderate proposals for civil remedies along this line made by Professors Delgado and Nockleby, and in my opinion that is reading the First Amendment for more than it is worth.

V. POLITICS: AFFIRMATIVE ACTION AND IDENTITY POLITICS

Let me conclude with some speculations on how recent politics have affected the law of campus hate speech. How did I get to be the author of a "speech code?" Recall, I wanted to protect students against ordinary invidious discrimination, including discriminatory harassment, of the sort that even conservative courts have found unproblematically prohibitable in the employment area. n140 At the same time, I thought that prohibiting harassment on campus could easily turn into enforcing political orthodoxy. Having a cross burned outside your dorm window is harassment that should be stopped, but constantly hearing affirmative action called a concession to the inferior could easily be considered harassment too.

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n140 Harris v. Forklift Sys., Inc., 114 S. Ct. 367 (1993); R.A.V. v. City of St. Paul, 505 U.S. 377, 389-90 (1992).

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The best guardrail against that slippery slope would be a regulation defining narrowly and clearly what speech could count as harassment; this just follows standard civil-libertarian strictures about the dangers of vagueness and chilling effect. But in the public and finally the judicial mind, the regulation enacted to provide this protection became a "speech code," and the whole effort ended up with a grotesquely unreal portrayal of [*941] Stanford as a campus under the dominion of the thought police.

Two political subplots may help explain how this came to pass. First, while anti-harassment regulation is not affirmative action but rather ordinary prohibition of invidious discrimination, it naturally attracts (at least on campuses) the opposition of those who are also opposed to affirmative action. Second, campus anti-harassment regulation is associated with "identity politics," and as such disturbs many liberal social democrats, most of whom support affirmative action in faculty hiring and student admissions.

I don't mean to suggest that all opposition to regulations like the Stanford policy is to be explained as part of some unconscious or unstated political agenda. Some libertarian opponents of these policies consistently argue that the intrusion on free speech caused by anti-harassment policies is not justified by the discrimination they prevent. The distinguishing mark of these critics is that they take primary aim at the genuinely significant form of hostile environment discrimination law in our society, that which is so broadly enforced in the employment area. n141 With respect to discriminatory harassment, the campus is a minor sideshow to the workplace.

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n141 See Browne, supra note 32; Volokh, supra note 100. Though in my opinion Browne throws out the baby with the bathwater and even Volokh's more moderate proposal is unduly limiting, these critics do a service in pointing out the censorial and puritanical excesses that are occurring in workplace anti-harassment enforcement, which have so far gotten a free ride from most liberals.

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But most opponents of "campus speech codes" see no serious civil liberties problems with hostile environment protection in the workplace. They accept this as a straightforward application of the widely accepted prohibition of discrimination in hiring, pay, and working conditions. Why isn't a campus harassment regulation an example of the same straightforward extension of normal prohibitions of discrimination in education?

One answer comes from a familiar story told against campus affirmative action, which goes something like this:

Affirmative action lets into the university minority students who are less qualified to do the work than the rest of the students. This reinforces racial stereotypes, and leads the majority to resent the minority as usurpers, or to patronize [*942] them as objects of charity. The minority know this, and it adds to the anxiety many of them already feel about whether they truly belong. This leads them to perceive imagined slights and to elevate slights into assaults, whereupon their militant, separatist, and "over-sensitive" response further reinforces stereotypes and stimulates additional resentment or patronization, which in turn . . . . In this downward spiral of misunderstanding and conflict, a campus speech code becomes (if it is narrow) a symbolic sop to the beneficiaries and supporters of the failed affirmative action admission policy, and (if it is broad) gives affirmative action administrators a weapon with which to silence the critics of the policy.

This is not the place to debate the merits of affirmative action in university admissions. Stanford has such a policy, which it regards as consistent with its pledge of non-discrimination. I personally think it is a good policy. But the need to protect unpopular minorities against harassment is quite independent of any affirmative action policy. For example, the students who are probably most likely in practical terms to face the sort of targeted personal abuse forbidden in the Stanford policy are gay and lesbian students, and yet they are not the beneficiaries of any preferential treatment in admissions.

The Stanford policy attracted opposition from critics of affirmative action in another way, one that was more specific to its own details. The policy was neutral on its face, but foreseeably asymmetric in application. What made the Stanford policy both exceptionally narrow and relatively more objective than others was the requirement that to violate it, someone had to make insulting and targeted use of an actual racial epithet or its equivalent -- or as the somewhat ponderous legal definition had it, a word or symbol "commonly understood to convey direct and visceral hatred or contempt for human beings on the basis of their sex, race, color, handicap, religion, sexual orientation, or national and ethnic origin." n142 This had the virtue for antivagueness purposes that practically everyone knows what these words and symbols are, and that when used to insult, they automatically make an insult into a very serious one.

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n142 See infra Appendix.

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Indeed the test built in an "almost everyone knows" element -- in order to be an epithet, a word or symbol had to be "commonly [*943] understood" to

have the force of extreme insult against members of the group to which it is applied. But this narrowing and clarifying feature also heightened the asymmetric aspects of the regulation. There are lots of nasty epithets that are applicable in a blanket fashion to black people, Jews, Mexicans, Chinese, Japanese, gay men and lesbians, and women, and everyone knows what they are. There are no such epithets (or at least hardly any) that are "commonly understood" as insulting slurs upon white people, n143 heterosexuals, and men n144 as such. This meant that in practice nothing said to a white heterosexual male would obviously violate the policy, while plenty of things that could be said to women, people of color, and gays and lesbians would do so.

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n143 Does the word "honkey" qualify? It seems to me a close case, as the word is not in wide or familiar use. In any event, before it penetrated the general culture in the 1960s, there certainly were no recognized group epithets for white people that were recognized by most white people as such -- the very idea was inconceivable.

n144 The difference between the epithets based on sexual parts is instructive. "Prick" is a sex-linked but not sex-based epithet -- it always means "unpleasant person who happens to be male." "Cunt" can have a similar connotation with respect to women, but in its more usual usage it is a sex-based slur, meaning simply "woman -- all of whom are low and vile." "Bitch" more often used to be only sex-linked, but recently seems to have shifted toward becoming another sex-based epithet. "Bastard" (the comparable sex-linked word for males) doesn't seem to have shifted toward becoming a sex-based epithet in the same sense at all.

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This seemed to me an advantage of the policy. In addition to narrowing it and making its application relatively objective (via the "commonly understood" proviso), it served the educational purpose of pointing out that harassment, like other forms of discrimination, is not a symmetrically or randomly distributed phenomenon. Group-based stratification is an historical and contemporary reality in American life, and thinking about the distribution and intensity of the "epithets" provides a window upon the nature and degree of this stratification that is easily accessible to every native speaker of Americanese.

The policy might have served this educational purpose for some people, but I believe this feature also angered defenders of symmetrical civil-rights policy by emphasizing social facts whose reality (or at least relevance to civil rights policy) they deny. This may have been an important factor in keeping opposition [*944] to the policy alive and even fervent in some quarters, despite the policy's extremely narrow scope, and the absurdity (given that narrow scope) of claims that it was exerting a chilling effect on campus debate.

I was not surprised when some opponents of affirmative action also opposed the policy, for the reasons these two stories suggest. But affirmative action admissions policies in universities are still flourishing, though under attack, while campus antiharassment regulations like Stanford's that mention speech have been grouped together under the fatal label "speech codes," and are generally in retreat.

I believe this is because they unexpectedly (at least to me) attracted the opposition not only of anti-affirmative-action conservatives and libertarians, but also of many liberals who support both vigorous traditional civil-rights enforcement and affirmative action. These liberals generally support strong hostile environment discrimination enforcement in the workplace, but when it shows up on campus, they readily see its manifestation is a "speech code" and turn against it.

Part of this is no doubt explained simply by the power of categories. Some of the campus anti-harassment regulations do cast a serious chill over ordinary cultural and political debate. The paradigm case remains the Michigan regulation, which told students they would be subject to discipline if they argued in class that women were genetically less aggressive than men or that homosexuality was a disease. Liberals of course oppose this kind of censorship, and then it becomes natural to group together all campus anti-discrimination regulations that mention speech as "speech codes." By familiar linguistic pathways, this carries the connotations created by regulations of the Michigan type over to condemn the Stanford or Wisconsin rules, which protect all public discourse on campus from regulation and prohibit only private and targeted personal abuse. If what they regulate includes "speech," they are "speech codes," and subject to the blanket condemnation generated by their prototype. n145

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n145 Robert Post writes perceptively about the distortions of First Amendment doctrine caused by thinking of it as designed to protect a single basic category of human activity called "speech," rather than paying attention to the values that justify special constitutional scrutiny of various rationales for regulation and protection for various social practices that involve communication. Robert Post, Recuperating First Amendment Doctrine, 47 STAN. L. REV. 1249, 1270-79 (1995). But freedom of speech is about "speech," and that is another illustration of the power of categories.

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[*945] But another factor also lies behind the opposition of many traditional liberals to anti-harassment regulations on campus -- their association with "identity politics." This is the label placed by liberals on roughly the same phenomenon as conservatives and libertarians call "political correctness." Many traditional liberals, and I include myself, do think that the intense recent focus on matters of culture and group identity, especially on the academic left, has served to splinter the traditional liberal coalition and to distract attention from the issues that should most concern liberals, those involved with the widening income and class gap in our society. As a result, liberals have not been as effective as we should be in articulating and promoting a program aimed at the crisis in our political economy.

Henry Louis Gates elegantly states this critique in his essay "Let Them Talk," n146 one of the most effective pieces of political writing to come out of the hate speech controversy. Professor Gates says that liberals and radicals in the academy have put too much stress on matters of group identity and culture, and not enough on matters of class and economics. He thinks that deconstructing hegemonic texts will not do much to undermine the American caste system, and that cultural studies will not protect poor mothers' welfare checks or blue

and pink collar workers' jobs. To him, speech codes epitomize both the distracting and the splintering aspect of identity politics. They divert intellectual attention to cultural issues that are much less important than the dramatic increase of economic inequality associated with globalization, the information economy, and the assault on the welfare state. And by setting previously allied civil rights advocates and civil libertarians against each other in a sideshow debate, they unnecessarily divide people who need to present a united front at a time when the left is weak.

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n146 Henry L. Gates, Jr., Let Them Talk, 209 THE NEW REPUBLIC, Sept. 20-27, 1993, at 37.

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Professor Gates goes on to distinguish carefully between campus "speech codes" that challenge the fundamentals of liberal free speech doctrine, and narrow regulations like the Stanford [*946] policy, which accept the basic civil libertarian framework. The former unnecessarily alienate civil libertarians, and hence fragment the liberal coalition in a way the latter do not. But still he sees them all as "speech codes," all part of identity politics, and all a mistake. While the Stanford policy does not disunify, it does distract, turning attention from (for example) the arguments and evidence in The Bell Curve, which play an important role in maintaining America's racial caste system, toward the isolated drunken undergraduate shouting epithets on the campus of an elite university.

As I have tried to say here, the policy as I conceived it was never meant to channel the intellectual agenda in any such ambitious way. It had very modest aims, mostly of a civil-libertarian kind -- to limit and specify the kind of speech that could be treated as discriminatory harassment. It did presuppose a duty on the part of the University to hold reasonably equal the terms and conditions of study for its students, and assumed that this duty is violated if students who belong to groups traditionally subject to discrimination are allowed to be humiliated by unchecked verbal abuse while trying to get their work done. This seems not a dramatic or unsettling claim, but rather one that readily follows by analogy from the treatment of the workplace generally accepted by liberals today. The principle of equality that lies behind it is also traditional, and I had hoped uncontroversial -- that the concern for equal civil rights has to do not only with paychecks and penalties, but also with hearts and minds. If that is identity politics, then identity politics is not all bad.

[*947] APPENDIX: THE STANFORD POLICY -- TEXT AND COMMENTS n147

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n147 As adopted June 1990. The Comments were distributed to students along with the text during the period the policy was in effect.

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The Fundamental Standard states:

"Students at Stanford are expected to show both within and without the University such respect for order, morality, personal honor and the right of others as is demanded of good citizens. Failure to do this will be sufficient cause for removal from the University."

Some incidents in recent years on campus have revealed doubt and disagreement about what this requirement means for students in the sensitive area where the right of free expression can conflict with the right to be free of invidious discrimination. This interpretation of the Fundamental Standard is offered by the Student Conduct Legislative Council to provide students and administrators with guidance in this area.

FUNDAMENTAL STANDARD INTERPRETATION: FREE EXPRESSION AND DISCRIMINATORY HARASSMENT

1. Stanford is committed to the principles of free inquiry and free expression. Students have the right to hold and vigorously defend and promote their opinions, thus entering them into the life of the University, there to flourish or wither according to their merits. Respect for this right requires that students tolerate even expression of opinions which they find abhorrent. Intimidation of students by other students in their exercise of this right, by violence or threat of violence, is therefore considered to be a violation of the Fundamental Standard.

2. Stanford is also committed to principles of equal opportunity and non-discrimination. Each student has the right of equal access to a Stanford education, without discrimination on the basis of sex, race, color, handicap, religion, sexual orientation, or national and ethnic origin. Harassment of students on the basis of any of these characteristics contributes to a hostile environment that makes access to education for those subjected to it less than equal. Such discriminatory harassment is therefore considered to be a violation of the Fundamental Standard.

[*948] 3. This interpretation of the Fundamental Standard is intended to clarify the point at which protected free expression ends and prohibited discriminatory harassment begins. Prohibited harassment includes discriminatory intimidation by threats of violence, and also includes personal vilification of students on the basis of their sex, race, color, handicap, religion, sexual orientation, or national and ethnic origin.

4. Speech or other expression constitutes harassment by personal vilification if it:

a) is intended to insult or stigmatize an individual or a small number of individuals on the basis of their sex, race, color, handicap, religion, sexual orientation, or national and ethnic origin; and
b) is addressed directly to the individual or individuals whom it insults or stigmatizes; and
c) makes use of insulting or "fighting" words or non-verbal symbols.

In the context of discriminatory harassment, insulting or "fighting" words or non-verbal symbols are those "which by their very utterance inflict injury or tend to incite to an immediate breach of the peace," and which are commonly understood to convey direct and visceral hatred or contempt for human beings on the basis of their sex, race, color, handicap, religion, sexual orientation,

or national and ethnic origin.

* * * *

COMMENTS

The Fundamental Standard requires that students act with "such respect for . . . the rights of others as is demanded of good citizens." Some incidents in recent years on campus have revealed doubt and disagreement about what this requirement means for students in the sensitive area where the right of free expression can conflict with the right to be free of invidious discrimination. This interpretation is offered for enactment by the Student Conduct Legislative Council to provide students and administrators with some guidance in this area.

[*949] The interpretation first restates, in Sections 1 and 2, existing University policy on free expression and equal opportunity respectively. Stanford has affirmed the principle of free expression in its Policy on Campus Disruption, committing itself to support "the rights of all members of the University community to express their views or to protest against actions and opinions with which they disagree." The University has likewise affirmed the principle of non-discrimination, pledging itself in the Statement of Nondiscriminatory Policy not to "discriminate against students on the basis of sex, race, color, handicap, religion, sexual orientation, or national and ethnic origin in the administration of its educational policies." In Section 3, the interpretation recognizes that the free expression and equal opportunity principles conflict in the area of discriminatory harassment, and draws the line for disciplinary purposes at "personal vilification" that discriminates on one of the bases prohibited by the University's non-discrimination policy.

1. Why prohibit "discriminatory harassment," rather than just plain harassment?

Some harassing conduct would no doubt violate the Fundamental Standard whether or not it was based on one of the recognized categories of invidious discrimination -- for example, if a student, motivated by jealousy or personal dislike, harassed another with repeated middle-of-the-night phone calls. Pure face-to-face verbal abuse, if repeated, might also in some circumstances fit within the same category, even if not discriminatory. The question has thus been raised why we should then define discriminatory harassment as a separate violation of the Fundamental Standard.

The answer is suggested by reflection on the reason why the particular kinds of discrimination mentioned in the University's Statement on Nondiscriminatory Policy are singled out for special prohibition. Obviously it is University policy not to discriminate against any student in the administration of its educational policies on any arbitrary or unjust basis. Why then enumerate "sex, race, color, handicap, religion, sexual orientation, and national and ethnic origin" as specially prohibited bases for discrimination? The reason is that, in this society at this time, [*950] these characteristics tend to make individuals possessing them the target of socially pervasive invidious discrimination. Persons with these characteristics thus tend to suffer the special injury of cumulative discrimination: they are subjected to repetitive stigma, insult, and indignity on the basis of a fundamental personal trait. In addition, for most of these groups, a long history closely associates extreme verbal abuse with intimidation by physical violence, so that vilification is

experienced as assaultive in the strict sense. It is the cumulative and socially pervasive discrimination, often linked to violence, that distinguishes the intolerable injury of wounded identity caused by discriminatory harassment from the tolerable, and relatively randomly distributed, hurt of bruised feelings that results from single incidents of ordinary personally motivated name-calling, a form of hurt that we do not believe the Fundamental Standard protects against.

2. Does not "harassment" by definition require repeated acts by the individual charged?

No. Just as a single sexually coercive proposal can constitute prohibited sexual harassment, so can a single instance of vilification constitute prohibited discriminatory harassment. The reason for this is, again, the socially pervasive character of the prohibited forms of discrimination. Students with the characteristics in question have the right to pursue their Stanford education in an environment that is not more hostile to them than to others. But the injury of discriminatory denial of educational access through maintenance of a hostile environment can arise from single acts of discrimination on the part of many different individuals. To deal with a form of abuse that is repetitive to its victims, and hence constitutes the continuing injury of harassment to them, it is necessary to prohibit the individual actions that, when added up, amount to institutional discrimination.

3. Why is intent to insult or stigmatize required?

Student members of groups subject to pervasive discrimination may be injured by unintended insulting or stigmatizing remarks as well as by those made with the requisite intent. In addition, the intent requirement makes enforcement of the prohibition of discriminatory harassment more difficult, particularly since proof . [*951] beyond a reasonable doubt is required to establish charges of Fundamental Standard violations.

Nevertheless, we believe that the disciplinary process should only be invoked against intentionally insulting or stigmatizing utterances. The kind of expression defined in Section 4(c) does not constitute "insulting or 'fighting' words" unless used with intent to insult. For example, a student who heard members of minority groups using the standard insulting terms for their own group in a joking way among themselves might -- trying to be funny -- insensitively use those terms in the same way. Such a person should be told that this is not funny, but should not be subject to disciplinary proceedings. It should also not be an disciplinary offense for a speaker to quote or mention in discussion the gutter epithets of discrimination; it is using these epithets so as to endorse their insulting connotations that causes serious injury.

4. Why is only vilification of "a small number of individuals" prohibited, and how many are too many?

The principle of free expression creates a strong presumption against prohibition of speech based upon its content. Narrow exceptions to this presumption are traditionally recognized, among other categories, for speech that is defamatory, assaultive, and (a closely related category) for speech that constitutes "insulting or 'fighting' words." The interpretation adopts the concept of "personal vilification" to help spell out what constitutes the prohibited use of fighting words in the discrimination context. Personal

vilification is a narrow category of intentionally insulting or stigmatizing discriminatory statements about individuals (4a), directed to those individuals (4b), and expressed in viscerally offensive form (4c).

The requirement of individual address in Section 4(b) excludes "group defamation" -- offensive statements concerning social groups directed to the campus or the public at large. The purpose of this limitation is to give extra breathing space for vigorous public debate on campus, protecting even extreme and hurtful utterance in the public context against potentially chilling effect of the threat of disciplinary proceedings.

[*952] The expression "small number" of individuals in 4(a) is meant to make clear that prohibited personal vilification does not include "group defamation" as that term has been understood in constitutional law and in campus debate. The clearest case for application of the prohibition of personal vilification is the face to face vilification of one individual by another. But more than one person can be insulted face to face, and vilification by telephone is not (for our purposes) essentially different from vilification that is literally face to face.

For reasons such as these, the exact contours of the concept of insult to "a small number of individuals" cannot be defined with mechanical precision. One limiting restriction is that the requirements of 4(a) and 4(b) go together, so that a "small number" of persons must be no more than can be and are "addressed directly" by the person conveying the vilifying message.

To take an important example, I believe that a racist or homophobic poster placed in the common area of a student residence might be found to constitute personal vilification of the African-American or gay students in that residence. Any such finding would, however, be context-specific, turning on the numbers involved, as well as on the evidence of the perpetrator's own knowledge and intentions.

5. What is the legal basis for the concept of "insulting or 'fighting' words," and what is the concept's relation to the actual threat of violence on the one hand, and to the actual infliction of emotional distress on the other?

In its unanimous decision in Chaplinsky v. New Hampshire (1942), the Supreme Court spoke of "certain well-defined and narrowly limited classes of speech" which are outside the protection of the First Amendment because their utterance is "no essential part of any exposition of ideas" and of such "slight social value as a step to truth" that they can be prohibited on the basis of "the social interest in order and morality." Along with libel and obscenity, this category was said to include "insulting or 'fighting' words -- those which by their very utterance inflict injury or tend to incite an immediate breach of the peace."

[*953] In subsequent opinions, the Court has consistently reaffirmed the basic Chaplinsky doctrine. At the same time, the Court has clarified the concept of "insulting or 'fighting' words" in two important ways. First, where the state attempts to punish speech for provoking violence, the threat of violence must be serious and imminent (Gooding v. Wilson, 1972). Second, the "insulting or fighting words" exception does not allow prohibition of utterances offensive to the public at large, but must be confined to insults or affronts addressed to directly individuals, or thrust upon a captive audience (Cohen v. California,

1971).

The Supreme Court's phrase "insulting or 'fighting' words" is often shortened to simply "fighting words," an expression which, while roughly capturing the sort of personally abusive language we mean to prohibit, may also have certain misleading connotations. First, the expression may imply that violence is considered an acceptable response to discriminatory vilification; but we prohibit these utterances so that disciplinary proceedings may substitute for, not supplement, violent response. Second, exclusive focus on the actual likelihood of violence might suggest that opponents of controversial speech can transform it into forbidden "fighting words" by plausibly threatening violent response to it -- the so-called "heckler's veto." The speech, if it to be subject to be restraint, must also be grossly insulting by the more objective standard of commonly shared social standards. Finally, the "fighting words" terminology might be thought to imply that extreme forms of personal abuse become protected speech simply because the victims are, for example, such disciplined practitioners of non-violence, or so physically helpless, or so cowed and demoralized, that they do not, in context, pose an actual and imminent threat of violent retaliation. Such a limitation might be appropriate under a breach of the peace statute, whose sole purpose is to prevent violence, but does not make sense in an anti-discrimination provision such as this one.

Another and largely overlapping category of verbal abuse to which legal sanctions may be applied is defined by the tort law concept of "intentional infliction of emotional distress." Much of the conduct that we define as discriminatory harassment might well give rise to a civil suit for damages under the "emotional distress" rubric. But that rubric has drawbacks as the legal basis for a discriminatory harassment regulation. It is less well established [*954] in free speech law than is the fighting words concept. Further, taken as it is from tort law, it focuses primarily on the victim's reaction to abuse; the question is whether he or she suffers "severe emotional distress?" We think it better in defining a disciplinary offense to focus on the prohibited conduct; we prefer not to require the victims of personal vilification to display their psychic scars in order to establish that an offense has been committed.

6. What is included and excluded by the provision requiring "symbols . . . commonly understood to convey direct and visceral hatred or contempt?"

These terms in Section 4(c) provide the most significant narrowing element in the definition of the offense of discriminatory personal vilification. They limit the offense to cases involving use of the gutter epithets and symbols of bigotry: those words, pictures, etc., that are commonly understood as assaultive insults whenever they are seriously directed against members of groups subject to pervasive discrimination. The requirement that symbols must be "commonly understood" to insult or stigmatize, and so injure "by their very utterance," narrows the discretion of enforcement authorities; it means that particular words or symbols thought to be insulting or offensive by a social group or by some of its members must also be so understood across society as a whole before they meet the proposed definition.

The kind of expression covered are words (listed, not exhaustively, and with apologies for the affront involved even in listing them) such as "nigger," "kike," "faggot," and "cunt;" symbols such as KKK regalia directed at African-American students, or Nazi swastikas directed at Jewish students. By contrast, a symbol like the Confederate flag, though experienced by many

African-Americans as a racist endorsement of slavery and segregation, is still widely enough accepted as an appropriate symbol of regional identity and pride that it would not in our view fall within the "commonly understood" restriction. The direction of profanities or obscenities as such at members of groups subject to discrimination is also not covered by the interpretation, nor is expression of dislike, hatred, or contempt for these groups, in the absence of the gutter epithets or their pictorial equivalents.

[*955] Making the prohibition so narrow leaves some very hurtful forms of discriminatory verbal abuse unprohibited. Substantively, this restriction is meant to ensure that no idea as such is proscribed. There is no view, however racist, sexist, homophobic, or blasphemous it may be in content, which cannot be expressed, so long as those who hold such views do not use the gutter epithets or their equivalent. Procedurally, the point of the restriction is to give clear notice of what the offense is, and to avoid politically charged contests over the meaning of debatable words and symbols in the context of disciplinary proceedings.

7. Does not the narrow definition of vilification imply approval of all "protected expression" that falls outside the definition?

Free expression could not survive if institutions were held implicitly to endorse every kind of speech that they did not prohibit. The Stanford community can and should vigorously denounce many forms of expression that are protected against disciplinary sanction. For example, while interference with free expression by force or intimidation violates the Fundamental Standard, less overt forms of silencing of diverse expression, such as too hasty charges of racism, sexism, and the like, do not. Yet the latter form of silencing is hurtful to individuals and bad for education; as such, it is to be discouraged, though by means other than the disciplinary process.

Similarly, while personal vilification violates the Fundamental Standard, even extreme expression of hatred and contempt for protected groups does not, so long as does not contain prohibited fighting words, or is not addressed to individual members of the groups insulted. Yet the latter forms of speech cause real harm, and should be sharply denounced throughout the University community. Less extreme expressions of bigotry (including off-hand remarks that embody harmful stereotypes) are also hurtful to individuals and bad for education. They too should be discouraged, though again by means other than the disciplinary process.

In general, the disciplinary requirements that form the content of the Fundamental Standard are not meant to be a comprehensive account of good citizenship within the Stanford community. [*956] They are meant only to set a floor of minimum requirements of respect for the rights of others, requirements that can be reasonably and fairly enforced through a disciplinary process. The Stanford community should expect much more of itself by way of tolerance, diversity, free inquiry and the pursuit of equal educational opportunity than can possibly be guaranteed by any set of disciplinary rules.

8. Is the proposal consistent with the First Amendment?

Though Stanford as a private university is not bound by the First Amendment as such, it has for some years taken the position that, as a matter of policy, it would treat itself as so bound. We agree with the policy, and we believe

that this proposal is consistent with First Amendment principles as the courts have developed them. However no court has ruled on the constitutionality of a harassment restriction based on the "insulting or 'fighting' words" concept, and no one can guarantee that this approach will prove acceptable.

Some civil libertarians would urge abolition of the fighting words category altogether; others would urge that it be strictly confined to cases involving the imminent threat of violence; still others would object to the content-specificity of a prohibition of discriminatory abusive utterances. We believe these objections are not likely to prevail with the courts, especially as applied to a narrowly drawn prohibition like this one. What in our view is virtually certain is that any much broader approach, for example one that proceeds on the basis of a theory of group defamation, or (like the University of Michigan regulation recently struck down by a federal court) on the basis of the tendency of speech to create a hostile environment, without restriction to "fighting words" (or some comparably narrow equivalent), will be found by courts applying current case law to be invalid.

LEVEL 1 - 80 OF 96 ITEMS

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SYMPOSIUM: DEVELOPMENTS IN FREE SPEECH DOCTRINE: CHARTING THE NEXUS BETWEEN SPEECH AND RELIGION, ABORTION, AND EQUALITY: ARTICLE: When A Speech Code Is A Speech Code: The Stanford Policy and the Theory of Incidental Restraints

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SUMMARY:
... The title of Professor Grey's article, How to Write a Speech Code Without Really Trying, is instructive, if in some tension with what follows it. ... What is perhaps most disturbing about the Stanford experience is not that the University adopted, yes, a speech code, but that in doing so, it did little to foster, and perhaps much to undermine, its own (and Grey's own) goal of equality. ... Grey defends the Stanford Policy primarily on the basis of the distinction prevalent in First Amendment law between direct and incidental restraints on expression. ... The Stanford student who wishes to engage in race-based invective will "suffer" no more from a direct restriction on hate speech than from a generally applicable anti-discrimination regulation that covers all the speech affected by the direct restriction, but conduct in addition. ... If the conduct encompassed by an incidental restriction has some expressive content, as almost all conduct does, Grey's insight would seem to allow direct restriction of any speech with the same message. ... Some distinction between direct and incidental restraints, regardless whether the precise motive-related distinction used in current law, thus seems a necessary component of a free speech system. ... This regulation, unlike Grey's Policy, is an incidental restraint. ...

TEXT:
[*957] The title of Professor Grey's article, How to Write a Speech Code Without Really Trying, is instructive, if in some tension with what follows it. The title suggests two points: first, that Grey did not intend to write a speech code; second, that Grey wrote a speech code. I'll trust Grey on the first; he would know better than I. I'll agree with him on the second -- except that I'm agreeing with his title only; as the rest of his article makes clear, Grey still denies he wrote a speech code. It is on that essential point, involving the

distinction in First Amendment doctrine between direct and incidental restraints, that I take issue with his exceptionally interesting and provocative article.

Grey wrote an exceedingly narrow speech code -- perhaps the narrowest that can be imagined. He wrote a speech code, as he insists, that in some sense recognized the value of a free speech system. He wrote a speech code that a reasonable system of First Amendment law could permit. n1 But Grey did write a [*958] speech code, and from that fact a great deal both does and should follow.

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n1 This is not to say that the current system of First Amendment law permits the Stanford Policy. That Policy, as Grey explains, barred a subset of unprotected speech -- specifically, fighting words, based on sex, race, or other listed characteristics. As restrictions on speech go, this one is narrow indeed; too, it is prefaced, for whatever this is worth, with a statement of commitment to the principles of free inquiry and speech. But unless Grey is right that the Stanford Policy should be viewed not as a ban on speech, but as part of a generally applicable regulation against discrimination, the Policy falls within the holding of R.A.V. v. City of St. Paul, 505 U.S. 377 (1992), that a prohibition of race-based fighting words violates the First Amendment. I have discussed that decision in an earlier article. See Elena Kagan, The Changing Faces of First Amendment Neutrality: R.A.V. v. St. Paul, Rust v. Sullivan, and the Problem of Content-Based Underinclusion, 1993 S. CT. REV. 29, 60-76. As I noted there, I agree with Grey and all the concurring Justices in R.A.V. that even under its own analysis, the R.A.V. Court might well have upheld the St. Paul ordinance -- and thus also approved the Stanford Policy -- as a ban on the subcategory of fighting words that most pose the dangers associated with fighting words generally.

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This Comment on Grey's article addresses the scope of the First Amendment's doctrine of incidental restraints, which I think Grey misdescribes. It considers both the rationale and the need for that doctrine, which I think Grey underacknowledges. And finally it notes some practical political effects of the doctrine, which I wish Grey, in his capacity as drafter of the Stanford Policy, had more fully recognized. What is perhaps most disturbing about the Stanford experience is not that the University adopted, yes, a speech code, but that in doing so, it did little to foster, and perhaps much to undermine, its own (and Grey's own) goal of equality.

I. APPLYING THE DOCTRINE OF INCIDENTAL RESTRAINTS

Grey defends the Stanford Policy primarily on the basis of the distinction prevalent in First Amendment law between direct and incidental restraints on expression. n2 The Policy, according to Grey, did not concern speech as such; it concerned all discriminatory harassment, of which "hate speech," narrowly defined, formed just a part. n3 Because the Policy was generally applicable [*959] in this manner, applying to both speech and conduct, it raised no serious First Amendment problem. Of course, the Policy specifically described its application to expression, explaining that fighting words based on sex, race, color, handicap, religion, sexual orientation, or national and ethnic

origin fell within its broader coverage. But this explicit notation, according to Grey, should have counted for, rather than against, the Policy because by making clear precisely what speech the general prohibition covered, the reference mitigated the potential chilling effect of the Policy on other expression. n4

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n2 Grey's need to defend the constitutionality of the Policy arises from the Leonard Law, which applies First Amendment requirements to the disciplinary regulations of California's private universities. See CAL. EDUC. CODE @ 94367 (West Supp. 1996). Even before passage of the Leonard Law, however, both Stanford and Grey had committed themselves to abiding by First Amendment standards. Whether a university like Stanford should commit itself in this manner seems to me a difficult question, which this Comment will not address.

n3 See Thomas C. Grey, How to Write A Speech Code Without Really Trying: Reflections on the Stanford Experience, 29 U.C. DAVIS L. REV. 891, 928-35 (1996). Grey assumes in his article, as I do in this reply, that an inarguably general law against discriminatory harassment -- a law that did not mention speech at all -- would meet any applicable First Amendment requirements, even when applied to such speech as the Stanford Policy covered. The Supreme Court has indicated its agreement. See Harris v. Forklift Sys., Inc., 114 S. Ct. 367, 370 (1993). Some commentators, however, have disputed the point. See, e.g., Kingsley R. Browne, Title VII as Censorship: Hostile-Environment Harassment and the First Amendment, 52 OHIO ST. L.J. 481 (1991) (stating that broad judicial definition of harassment in Title VII, including speech, is inconsistent with First Amendment); Eugene Volokh, Freedom of Speech and Workplace Harassment, 39 UCLA L. REV. 1791 (1992) (arguing that general anti-harassment laws do not satisfy First Amendment requirements).

n4 See Grey, supra note 3, at 923-24.

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To evaluate this claim, it is necessary to take a step backward and ask what underlies the Court's distinction between direct and incidental restraints on expression. n5 The distinction makes no sense if what matters, under First Amendment doctrine, is the effects of a law on a speaker's expressive opportunities. The Stanford student who wishes to engage in race-based invective will "suffer" no more from a direct restriction on hate speech than from a generally applicable anti-discrimination regulation that covers all the speech affected by the direct restriction, but conduct in addition. The distinction likewise makes no sense if what matters is the effects of a law on an audience's ability to hear and consider a range of viewpoints. Again, the debate about race in the Stanford community will "suffer" no more from the one (speech-directed) form of regulation than from the other (generally applicable) kind. So much is always true of the distinction between direct and incidental restraints: the Court's use of the distinction cannot derive from considering the effects of such restraints, whether on a speaker or on an audience. n6

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n5 For more expansive treatment of this subject, see Elena Kagan, Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment

Analysis, 63 U. CHI. L. REV. 413, 491-505 (1996); Frederick Schauer, Cuban Cigars, Cuban Books, and the Problem of Incidental Restraints on Communications, 26 WM. & MARY L. REV. 779 (1985); Geoffrey R. Stone, Content-Neutral Restrictions, 54 U. CHI. L. REV. 46, 105-14 (1987).

n6 To use a far-flung example, compare a (direct) law imposing a penny tax on the Sunday edition of the New York Times with a (generally applicable) law providing tax benefits for companies entering into certain kinds of mergers. Even if the effect of the direct law is nil and the effect of the generally applicable law is to restructure the whole communications industry, current doctrine subjects the former to strict scrutiny and the latter to mere rationality review.

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[*960] But now assume that First Amendment law largely concerns motives, rather than effects -- more specifically, that the doctrine has as its primary, though unstated, object the discovery of improper governmental motive. n7 This prohibited motive may roughly be termed "ideological"; it exists when simple disapproval of an idea -- as distinct from a neutral evaluation of the harm that idea causes -- enters into the decision to limit expression. n8 The Court, of course, cannot ascertain this illicit motive directly -- or at least, cannot do so with any effectiveness. Hence, the Court (whether consciously or not is unimportant) has constructed and relied upon a set of rules and categories, most focusing on the facial aspects of a law, that operates as a proxy for this direct inquiry. These rules comprise tools to flush out impermissible motive and invalidate actions infected with it: they enforce the central command of the First Amendment that the government cannot interfere in the realm of speech simply because it finds some ideas correct and others abhorrent.

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n7 For a broadscale defense of this proposition, discussing many aspects of First Amendment law, see Kagan, supra note 5.

n8 This definition of impermissible motive raises many hard questions, of both a conceptual and a practical nature. For discussion of these issues, which I cannot explore here, see generally id. at 428-37.

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The doctrine of incidental restraints, as Grey himself recognizes, n9 serves precisely this function of assisting in the discovery of improper motive. A generally applicable law by definition targets not a particular idea, nor even ideas broadly speaking, but an object that need not, and usually does not, have any association with ideas whatsoever. The breadth of these laws makes them poor vehicles for censorial designs; they are instruments too blunt for either effecting or reflecting ideological disapproval of certain messages. (Consider, for example, the likelihood that a law prohibiting fires in public places -- though encompassing such speech as the burning of an American flag -- has resulted from ideological disapproval of certain messages.) Thus, incidental restrictions receive minimal constitutional scrutiny because of the likelihood that they will also be accidental restrictions in the relevant sense -- that they will result from a process in which officials' hostility toward ideas qua ideas played no role.

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n9 See Grey, supra note 3, at 919.

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[*961] With this as background, turn to the Appendix of Grey's article and review the text of the Stanford Policy. n10 The Policy is not a regulation that, in the manner of incidental restraints generally, refers to a broad class of activity, including but nowhere mentioning expression. The Policy is not even a regulation that breaks down a broad class of activity into all its component parts, listing expression but equivalently listing kinds of non-expressive conduct as falling within the scope of the general prohibition. The Policy, although referring to a broad anti-discrimination ideal, is nonetheless -- on its face and by its terms -- all about expression. It explicitly considers the benefits and harms of expression; weighs the one against the other; determines the point at which ideals of free inquiry should give way to opposing values. The Policy, in other words, constitutes the very opposite of the usual incidental restraint: a specific and considered judgment of the desirability of restricting certain expression.

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n10 See id. at Appendix.

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As a law takes on this form, the Court's motive-based concerns rise to the fore. Consider, to continue the example previously offered, if a city were to replace its general ban on public fires with an ordinance explicitly discussing application of the ban to flag-burning. No one deciding whether to adopt the new, focused ordinance could do so without evaluating its effect on speech -- more, without evaluating its effect on a particular message. And in considering this effect, sheer hostility of the idea -- that is, impermissible motive -- well might enter the decision-making process. So too when Stanford adopted its new Policy, moving from a generalized "morals code" to an explicit exposition of how this code applied to certain racist (sexist, etc.) expression. In general, as a limit on speech becomes less hidden, the danger of illicit motive increases: hence the current doctrine's distinction between facially direct and facially incidental restrictions. n11 For a court to do what Grey suggests -- to classify an explicit speech-directed action as "incidental" whenever [*962] it can be conceptualized as a component of a broader, non-speech prohibition -- would subvert the very basis of the doctrine. Such a move would prevent the doctrine of incidental restraints from performing its core function of ferreting out impermissible governmental motive.

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n11 Of course, this generalization, like all generalizations, sometimes fails; it even could be argued that it does not hold up in the Stanford case because the initial incidental ban obviously and importantly (even if not facially) applied to speech. But the generalization works well enough to make it a useful test for ascertaining governmental motive, given the difficulty of finding such motive directly.

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Grey is right that the rule against directly referring to speech, if followed in this case, would have made the Policy's application to speech more vague and hence more chilling. But it is not surprising that First Amendment doctrine declines to take account of this point. First, the enhanced chilling effect that Grey notes is not usually, let alone invariably, the result of a narrow (i.e., the current) understanding of the category of incidental restraints. Such an effect arises here only because the contours of the general prohibition are unusually uncertain; in the more common case, a list of applications to speech will serve as much to confuse as to clarify the issue. n12 Second and more important, First Amendment doctrine, as I have suggested earlier, always cares less about effects than about motives. n13 In any clash between the two -- in any case in which a concern with untoward effects points to one doctrinal rule and a concern with improper motive points to another -- the doctrine tracks the concern with motive. The distinction between direct and incidental restraints, in both its broad outlines and its shadings, provides but a single instance. n14 Grey's attempt to rework the distinction -- to divorce it from its underlying motive-based rationale, which in turn links it with the rest of First Amendment doctrine -- thus was preordained for failure.

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n12 Consider, for example, the law against lighting fires in public places (incidentally restricting a person who burns a flag as a means of protest), or a law against vandalism (incidentally restricting a person who draws a swastika on a synagogue wall), or a law against trespass (incidentally restricting a person who burns a cross on private property). In cases of this kind -- which are very much the norm -- listing the law's potential applications to expression cannot serve a constitutionally legitimate purpose.

n13 See supra note 8 and accompanying text.

n14 See Kagan, supra note 5, at 491-505.

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II. CHALLENGING THE DOCTRINE OF INCIDENTAL RESTRAINTS

Perhaps recognizing the difficulty of labeling the Stanford policy an incidental rather than a direct restraint, Grey turns [*963] midway through his article to challenging the coherence of that distinction, at least when civil rights law is at issue. n15 The basic point is by now familiar, having become a staple of certain critical race theory. n16 We cannot distinguish, or so the argument goes, between civil rights statutes (incidental restraints) and hate speech codes (direct restraints), because both really target expression. In Grey's words, "we prohibit discrimination in significant part because of its 'expressive content,' because of the message of group inferiority it sends." n17 The proscription, for example, of segregated schools should be viewed at least in part as a ban on the message of racial inferiority, deemed to cause stigmatic injury. The proscription contained in a hate speech code is nothing more. Hence, to put the point in its bluntest form, the Supreme Court's decision in Brown v. Board of Education n18 conflicts with the district court's decision invalidating the Stanford Policy.

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n15 See Grey, supra note 3, at 934.

n16 See, e.g., Charles R. Lawrence III, If He Hollers Let Him Go: Regulating Racist Speech on Campus, 1990 DUKE L.J. 431, 449-57.

n17 Grey, supra note 3, at 934.

n18 347 U.S. 483 (1954).

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In staking this claim, Grey no doubt is on to something. Antidiscrimination laws are in part about message. Indeed, we can abstract Grey's point, because so too are other kinds of laws apparently directed at conduct. Many incidental restraints interfere, as civil rights laws do, with the communication of a message attending an act, as well as the injury that follows from that communication. This is because both conduct and speech may cause identical "expressive" harms, such as stigmatization. The phenomenon is not limited to the sphere of civil rights, but exists all over, by virtue of the simple fact that most acts say, as well as do, something. n19

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n19 Conversely, most speech does as well as says something in some sense. For the most extreme version of this claim and its implications, see CATHARINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 129-30, 193-94 (1987). For a more moderate version, in part critiquing MacKinnon, see Cass R. Sunstein, Words, Conduct, Caste, 60 U. CHI. L. REV. 795, 836-40 (1993).

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But it is well not to overstate the equivalence of an act and the message it carries, whether in the field of civil rights or in any other. Grey provides, though perhaps does not highlight [*964] sufficiently, the appropriate caveat: after all, he notes, discrimination (in employment, housing, or other material benefit) remains discrimination even when well hidden. n20 Message matters, but it is not all that matters; when the government forbids, say, segregated schools, it does more than shape the world of communication. This wider significance is precisely what justifies the generalization, discussed earlier, that an incidental restriction is less likely than a direct restriction to arise from hostility toward certain messages: because the government is regulating on the basis of something other, or at least more, than expressive content, this illicit factor should have less effect on the decision-making process.

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n20 See Grey, supra note 3, at 934-36.

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Perhaps more important, I count Grey's claim as a prime example of a category of academic ideas that I call Ultimately Useless Insights -- ideas that, however true and even important in some sense, do not and cannot assist in the elaboration of legal doctrine. Grey himself half-concedes this point by noting the logical conclusion of his insight: If civil rights laws partly target the "stigmatic messages" associated with conduct and if, therefore, the same messages, when conveyed by speech, are likewise subject to limit, "there wouldn't," in Grey's own words, "be much to freedom of speech on some of the central contested issues in our politics and culture." n21 Under the proposed analysis, the government (or a university operating under the government's rules) could restrict not only race-based (or sexbased, etc.) fighting words, but all speech that stigmatizes on the basis of group characteristics. The care that Grey put into crafting a carefully limited restriction, applying only to fighting words, would have been wasted. The expressive content of the conduct that civil rights laws target would render vast amounts of speech on race (or gender, etc.) proscribable.

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n21 Id. at 937. The alternative conclusion of Grey's insight is that there wouldn't be much to civil rights laws. This conclusion would hold if the message associated with discriminatory conduct brought laws prohibiting that conduct under the protection of the First Amendment.

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The same point applies generally. If the conduct encompassed by an incidental restriction has some expressive content, as almost all conduct does, Grey's insight would seem to allow direct [*965] restriction of any speech with the same message. Alternatively, though Grey does not consider the possibility, his insight might require the protection of any conduct expressing a message -- that is, of conduct generally. Either way, First Amendment analysis becomes impossible: either the First Amendment protects no speech, or it protects speech and all else in addition. Some distinction between direct and incidental restraints, regardless whether the precise motive-related distinction used in current law, thus seems a necessary component of a free speech system.

Grey may agree with this much; perhaps in questioning the conceptual foundations of the distinction, he wishes not so much to overturn it as to render it irrelevant to certain (but only certain) civil rights-type cases. But if that is the point of his critical insight, he must show how what he calls the "hearts and minds" argument can fit within, rather than subvert, a workable, judicially administrable doctrine of incidental restrictions. Until then, Brown will not justify the Stanford Policy.

III. POLITICS, THE POLICY, AND THE DOCTRINE OF INCIDENTAL RESTRAINTS

Stanford, of course, had a policy before (and after) the Policy -- a policy that the Policy was supposed to enhance. Termed the Fundamental Standard, it requires "respect for order, morality, personal honor and the rights of others." n22 Interpreted on a case-by-case basis over the years, the Standard is understood to prohibit, in the words of the President of the University, all "harassment, whether accompanied by speech or not, including harassment that is motivated by racial or other bigotry." n23 This regulation, unlike Grey's Policy, is an incidental restraint. n24

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n22 Id. at 893 n.6 (quoting Stanford's Fundamental Standard).

n23 Id. at 897 n.20 (quoting Stanford President Gerhard Casper).

n24 To say that the Standard is an incidental restraint is not to say that the First Amendment is irrelevant. An incidental restraint, when applied to speech, may trigger heightened scrutiny (usually of an intermediate level), as the seminal case of United States v. O'Brien, 391 U.S. 367, 376-77 (1968), shows. Applications of the Standard to expression thus may have to meet certain First Amendment requirements. But I agree with Grey -- and with the dictum in R.A.V. v. City of St. Paul, 505 U.S. 377, 389 (1992) -- that this would not be the case where the speech affected falls within a category of wholly proscribable speech, as do threats or fighting words. And even when speech is fully protected, as in O'Brien, the application of an incidental restriction to the speech usually (though not always) will receive more deferential treatment than a direct restraint on the same expression.

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[*966] Like many incidental restraints, the Standard has a potentially profound effect on expression. The Standard, as interpreted, already may have prohibited all of the speech specifically barred by the Policy. No doubt the Standard prohibited more speech besides. Judged solely by its efficacy in eradicating a certain kind of harmful speech, the direct restriction held no advantage over the incidental restraint.

Proponents of the Policy might claim for it a symbolic function. True, the Standard might succeed in punishing bigoted speech of a harassing nature. What the Standard cannot do -- precisely because it is an incidental restriction -- is to send a clear message about the University's attitude toward this expression. Grey has argued in support of his Policy on another occasion that it was necessary to convey the University's attitude toward bigotry and intolerance. n25 Similarly, Richard Delgado has urged on behalf of his proposed tort action for racial insults, which Grey approves, that it "communicat[es] to the perpetrator and to society that such abuse will not be tolerated." n26 The general proscription can accomplish all the garden-variety ends of regulation; the particular, speech-directed proscription is needed, or so the argument runs, to communicate as forcefully as possible the governmental actor's commitment to the goal of equality.

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n25 See Thomas C. Grey, Civil Rights vs. Civil Liberties: The Case of Discriminatory Verbal Harassment, 8 SOC. PHIL. & POL'Y 81, 104 (Spring 1991) (writing that "I concede that the main purposes behind the proposal are in a certain sense educative or symbolic.").

n26 Richard Delgado, Words That Wound: A Tort Action for Racial Insults, Epithets, and Name Calling, 17 HARV. C.R.-C.L. L. REV. 133, 147 (1982).

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This understanding of the Policy, which views an orientation toward speech as critical to the achievement of the regulatory goal, itself casts doubt on Grey's claim to have drafted an incidental restriction. Indeed, this view of the Policy, by highlighting the different motives that may lie behind direct and incidental restrictions, suggests one of the key reasons for distinguishing between these kinds of regulation. But I want to end this commentary by placing these doctrinal issues to one side and evaluating Grey's handiwork solely in terms of its own primary objective: the advancement of equality in the University and the broader community. This evaluation suggests some practical [*967] political drawbacks of moving, as Grey and Stanford decided to do, from the generally applicable to the speech directed.

Grey himself alludes to such concerns, in the conclusion to his article, when he discusses the way in which adoption of the Stanford Policy distracted from debate, and potential progress, on more important issues of race and gender. n27 Grey notes that a broader argument about affirmative action on the Stanford campus was diverted into the controversy over fighting words. And citing Henry Louis Gates's potent arguments, Grey more generally concedes the ability of disputes on speech to shift attention from, even excuse inattention to, weightier issues, extending far beyond the academic setting, of inequality in housing, employment, and other material goods. n28 But even while acknowledging these costs, Grey stubbornly hangs on to the Stanford Policy, just as other academics in other educational institutions insist on still broader restrictions on expression. Hence occurs the direction of energy away from the alleviation of material inequalities and toward the elimination -- yes, of "only words" n29 -- of "insults, epithets, and name calling." n30

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n27 Grey, supra note 3, at 939-45.

n28 See id. at 928. Gates terms the critical race theorists' focus on hate speech "a see-no-evil, hear-no-evil approach toward racial inequality," noting that "even if hate [speech] did disappear, aggregative patterns of segregation and segmentation in housing and employment would not disappear." Henry L. Gates, Jr., Let Them Talk: Why Civil Liberties Pose No Threat to Civil Rights, THE NEW REPUBLIC, Sept. 20, 1993, at 49.

n29 CATHARINE A. MACKINNON, ONLY WORDS (1987).

n30 See generally Delgado, supra note 26.

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The costs of opening this two-front war are higher even than in the usual case -- greater than the inevitable loss of focus and dispersion of resources. As an initial matter, the second front here occurs in the one place where the opposition -- however disingenuous and hypocritical in fact -- seems to many to hold the high ground. n31 It is poor strategy to turn a battle about discrimination into a battle about speech -- to mount the kind of attack most likely to transform the forces of hatred into the [*968] defenders of constitutional liberty. Relatedly, the second front here causes not merely the division, but the permanent loss of resources. As speech codes, in Grey's words, "set civil rights advocates and civil libertarians . . . against each other," they threaten to rend the coalitions that have served well on other, more

important issues. n32 Grey's tactic of limiting and hedging such a code can contain, but not avert, this damage.

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n31 Even Charles Lawrence, a defender of at least some speech codes, has noted:

I fear that by framing the debate as we have -- as one in which the liberty of free speech is in conflict with the elimination of racism -- we have advanced the cause of racial oppression and . . . placed the bigot on the moral high ground, fanning the rising flames of racism.

Lawrence, supra note 16, at 436.

n32 Grey, supra note 3, at 944-45.

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I suspect that the temptation to fight on this ground, seemingly irrespective of tactical advantage, derives from frustration, even desperation, over the slow pace of progress in eradicating the tangible, socio-economic inequalities existing between blacks and whites and, to a lesser extent, between men and women. The magnitude and duration of these inequalities may make them appear impervious to political (let alone to academic) efforts. We do not know how to solve these problems; we may not even know how (or perhaps we are afraid) to talk about them. So some succumb to the allure of sideshows, such as the one involving the Stanford Policy. There, the issues seem contained, the solutions discernible, the link between activism and result still full of potential. Victory is achievable, if ultimately empty. n33

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n33 See Gates, supra note 28, at 49 (stating that "[t]he advocates of speech restrictions will grow disenchanted not with their failures, but with their victories, and the movement will come to seem yet another curious byway in the long history of our racial desperation").

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The lesson the Stanford experience suggests to me is one about resisting such urges. If, as Grey laments, "the effort ended up with a grotesquely unreal portrayal of Stanford as a campus under the dominion of the thought police" n34 -- if in doing so, the effort only undermined serious attempts to advance the goal of equality -- neither Grey nor Stanford should profess much surprise. Stanford's course of action -- its shift from a generally applicable ban on harassment, including racial or sexual harassment, whether or not accompanied by expression, to a targeted ban on certain bigoted harassing speech -- misjudged the political, as well as the legal, environment. Just as the Policy, in directly rather than incidentally restricting speech, became vulnerable to judicial invalidation, so too did it become a focal point [*969] for all manner of public complaint over Stanford's race and gender policies. The law and the politics of moving from the general to the particular thus coincided. From either perspective, Stanford and Professor Grey should have declined to convert an incidental into a direct restraint.

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n34 Grey, supra note 3, at 939-40.

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LEVEL 1 - 81 OF 96 ITEMS

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REVIEW ESSAY: SEX PANIC OR FALSE ALARM? THE LATEST ROUND IN THE FEMINIST DEBATE OVER PORNOGRAPHY

A Review Essay on Catharine A. MacKinnon's Only Words and Nadine Strossen's Defending Pornography:
Free Speech, Sex, and the Fight for Women's Rights

Margaret McIntyre*

* J.D., CUNY Law School, 1995. The author wishes to express her appreciation to Ruthann Robson for her comments and support, and to the members of the UCLA Women's Law Journal for their valuable contributions.

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See, e.g., Kimberle Crenshaw, Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color, 43 Stan. L. Rev. 1241, 1260 (1991) (discussing efforts made during a Senate debate on a measure to challenge the notion that domestic violence only happens in minority communities and arguing that such efforts politicize the problem in the dominant community but deflect attention from the problem as it exists in minority communities).

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SUMMARY:
... For nearly two decades, feminists have debated whether pornography causes harm to women and what, if anything, should be done about it. ... Strossen makes a valuable contribution to the pornography debate by making a dramatic statement of feminist opposition to restrictions of sexual expression. ... Words do not do it alone, of course, but what sexual harassment does, only words can do - or, rather, the harm of sexual harassment can be done only through expressive means. ... As a result of this connection between pornography and sexual harassment, Strossen argues that sexual expression entitled to First Amendment protection is being swept up in charges of sexual harassment. ... Strossen is also unequivocal about where responsibility for this tenuous connection between pornography and sexual harassment should be attributed: "Pornophobic feminists ... have used the concept of sexual harassment as a Trojan horse for smuggling their views on sexual expression into our law and culture." ... Stychin argues that gay male pornography functions as resistance to dominant male culture and is therefore entitled to constitutional protection as political speech. ... It can neither be expected to prevent sexual abuse of gay men that may be caused by pornography nor protect male sexual expression that does not function as sexual abuse. ...

TEXT:
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INTRODUCTION

For nearly two decades, feminists have debated whether pornography causes harm to women and what, if anything, should be done about it. n1 Although the word "pornography" ostensibly refers to a relatively narrow class of sexually explicit material, the [*190] debate is more fundamentally about how to eliminate the social practice of defining women solely in terms of sexuality. On a practical level, the debate is over the way to eliminate the very real problem of sexual violence. In a more abstract sense, the pornography debate is a struggle for power waged within the larger constitutional arena of "freedom of expression." That is, the terms of the debate are determined by the law and the debate in turn impacts on other legal struggles for power that involve expression, particularly hate speech and sexual harassment.

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n1. The group Women Against Pornography was formed in 1976. One of the earliest, most influential, and controversial indictments of the pornography industry is found in Andrea Dworkin, Pornography: Men Possessing Women (1980). Other early critiques of pornography from a feminist perspective include Susan Griffin, Pornography and Silence: Culture's Revenge Against Nature (1981); Take Back the Night: Women on Pornography (Laura Lederer ed., 1980). For a recent collection of feminist antipornography essays, see Making Violence Sexy: Feminist Views on Pornography (Diana E.H. Russell ed., 1993) [hereinafter Making Violence Sexy].

Feminist works that oppose restriction of sexual expression include Caught Looking: Feminism, Pornography & Censorship (Nan Hunter ed., 1986); Pleasure and Danger: Exploring Female Sexuality (Carol Vance ed., 1984); Powers of Desire: The Politics of Sexuality (Ann Snitow et al. eds., 1983); Nan D. Hunter & Sylvia A. Law, Brief Amici Curiae of Feminist Anti-Censorship Taskforce, et al., in American Booksellers Association v. Hudnut, 21 U. Mich. J.L. Ref. 69 (1987-88). A more recent and comprehensive discussion of the evolution of the feminist pornography debate, from an anticensorship perspective, is presented in Carlin Meyer, Sex, Sin, and Women's Liberation: Against Porn-Suppression, 72 Texas L. Rev. 1097 (1994).

For an excellent exploration of the differences among all opponents of pornography, see Robin West, The Feminist-Conservative Anti-Pornography Alliance and the 1986 Attorney General's Commission on Pornography Report, 1987 Am. B. Found. Res. J. 681.

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This Review Essay assesses the latest round in the feminist pornography debate. Catharine A. MacKinnon's Only Words n2 and Nadine Strossen's Defending Pornography, Free Speech, Sex, and the Fight for Women's Rights n3 present opposite ends of the spectrum of views on the subject. It is useful to examine the two books together because Defending Pornography is dedicated to refuting the efforts of antipornography feminists, particularly the antipornography legislation developed by Catharine MacKinnon and Andrea Dworkin, n4 which is defended by MacKinnon in Only Words.

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n2. Catharine A. MacKinnon, Only Words (1993). Analyses of Only Words in law reviews include C. Edwin Baker, Of Course, More Than Words, 61 U. Chi. L. Rev. 1181 (1994) (book review); Nadine Taub, A New View of Pornography, Speech, and Equality or Only Words?, 46 Rutgers L. Rev. 595 (1993) (reviewing Only Words); David C. Dinielli, Book Note, Only Words, 92 Mich. L. Rev. 1943 (1994); Elizabeth Matthews, Recent Publication, Only Words, 29 Harv. C.R.-C.L. L. Rev. 599 (1994); Book Note, Stripping Pornography of Constitutional Protection, 107 Harv. L. Rev. 2111 (1994) (reviewing Only Words).

n3. Nadine Strossen, Defending Pornography: Free Speech, Sex, and the Fight for Women's Rights (1995).

n4. American Booksellers Ass'n v. Hudnut, 771 F.2d 323 (7th Cir. 1985), aff'd without opinion, 475 U.S. 1001 (1986). The antipornography ordinance adopted by the city of Indianapolis, Indiana provided a private cause of action for anyone who could prove she was injured through pornography. The ordinance was ultimately found unconstitutional by the U.S. District Court for the Southern District of Indiana, 598 F. Supp. 1316 (1984), and by the Seventh Circuit of the U.S. Court of Appeals, 771 F.2d at 323. The ordinance at issue in Hudnut defined pornography as:

The graphic sexually explicit subordination of women, whether in pictures or in words, that also includes one or more of the following:

(1) Women are presented as sexual objects who enjoy pain or humiliation; or

(2) Women are presented as sexual objects who experience sexual pleasure in being raped; or

(3) Women are presented as sexual objects tied up or cut up or mutilated or bruised or physically hurt, or as dismembered or truncated or fragmented or severed into body parts; or

(4) Women are presented as being penetrated by objects or animals; or

(5) Women are presented in scenarios of degradation, injury, abasement, torture, shown as filthy or inferior, bleeding, bruised, or hurt in a context that makes these conditions sexual; or

(6) Women are presented as sexual objects for domination, conquest, violation, exploitation, possession, or use, or through postures or positions of servility or submission or display.

Id. at 324 (quoting Indianapolis and Marion County, Ind., Code ch. 16, 16-3(q)). The statute also provided that the "use of men, children, or transsexuals in the place of women in paragraphs (1) through (6) above shall also constitute pornography under this section." Id.

According to the decision of the Seventh Circuit, the ordinance provided a cause of action for persons injured through the trafficking in pornography, through coercion into pornographic performance, and through the "forcing of pornography on any woman, man, child, or transsexual in any place of

employment, in education, in a home, or in any public place." In addition, anyone injured by someone who has seen or read pornography was given a right of action against the maker or seller. Id. at 325-26 (citing 16-3(g)(4) and (5) of the Indianapolis Code).

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Catharine MacKinnon's Only Words is an expansion of her argument that pornography causes harm and that the law should change to recognize and alleviate that harm. n5 MacKinnon argues that the legal approach to pornography should consist of a balancing test that gives as much weight to the right to equality as to the right to free speech. She divides her argument in Only Words into three sections. The first section introduces the ways that pornography functions as harmful conduct and assesses the Hudnut n6 decision. The second section explores sexual harassment law in relation to freedom of expression. The third section lays out MacKinnon's theory for how the conflict between equality and free speech should be reconciled.

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n5. See, e.g., Catharine A. MacKinnon, Feminism Unmodified: Discourses on Life and Law 127-213 (1987) [hereinafter MacKinnon, Feminism Unmodified]; Catharine A. MacKinnon, Toward a Feminist Theory of the State 195-214 (1989) [hereinafter MacKinnon, Toward a Feminist Theory].

n6. See Strossen supra note 3.

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In stark contrast to MacKinnon, Nadine Strossen, president of the American Civil Liberties Union and professor of law at New York Law School, defends the availability of pornographic material. In Defending Pornography, Strossen defends the right to produce or consume pornography and argues that pornography can be valuable sexual expression. n7 Her premise is that the feminist movement to restrict pornography, led by Catharine [*192] MacKinnon and Andrea Dworkin, is a greater threat to women's equality than is pornography.

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n7. "Throughout this book, I use the term "pornography' to refer to the sexually oriented expression that MacKinnon, Dworkin, and their supporters have targeted for suppression. As I show, though, this definition is so amorphous that it can well encompass any and all sexual speech." Id. at 19.

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Strossen's main concern is that this country is now in a "sex panic" n8 in which all forms of sexual expression are under attack. Throughout Defending Pornography, Strossen frequently refers to the antipornography feminists as "MacDworkinites" n9 and directs the book at discrediting their ideas because she believes that they have "played a very significant role in fomenting this sex panic." n10 At issue in her book is not only the constitutionality of antipornography legislation but also the legal theory put forth by MacKinnon and other antipornography feminists. The book attacks the theory as well as its

impact on sexual harassment law.

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n8. Id. at 20. In 1993, the New York Law School Law Review combined all four of its volumes to produce a single edition devoted to articles on the "sex panic" to which Strossen refers. Symposium, The Sex Panic: Women, Censorship and "Pornography," 1-4 N.Y.L. Sch. L. Rev. 1 (1993).

n9. Strossen, supra note 3, at 13. Strossen attributes the creation of the term "MacDworkinites" to Marcia Pally, founder of Feminists for Free Expression.

n10. Id. at 20.

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Both Strossen and MacKinnon make valuable contributions to the pornography debate with these books. However, each author's position is limited by the extremity of her views. n11 In comparing the relative merits of the two authors' arguments, this Review Essay concludes that Strossen's concern that we are living in a "sex panic" is in fact a false alarm, and that it is a mistake to unequivocally defend pornography simply because it is sexual expression. Such "free speech absolutism" n12 is a greater threat to [*193] women's rights than are the ideas of Catharine MacKinnon. Although MacKinnon's insights into the harms caused to women by pornography do not always translate well into legally actionable harms, they are nevertheless extremely valuable to feminists seeking to end sexual violence.

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n11. In a review of Defending Pornography, Abbe Smith comments on the significance of Strossen's and MacKinnon's roles as lawyers in shaping their approaches to this debate:

The problem with Defending Pornography - as with much of Ms. MacKinnon's writing - is that it is an argument rather than a searching examination. Perhaps because both Ms. Strossen and Ms. MacKinnon are Ivy League-educated lawyers, trained in the art of advocacy, they mark out their positions first and then supply the supporting evidence. But arguments are less effective when framed in all-or-nothing terms with a preference for alarmism over evidence.

Abbe Smith, Freedom to Be Grossed Out: First Amendment Absolutism from the First Female Head of the A.C.L.U., N.Y. Times Book Rev., Jan. 22, 1995, at 13, 14.

n12. Strossen has recently clarified the ACLU position on free speech absolutism:

Free speech is not, as some assert, absolute, and the ACLU has never taken such a position. Nonetheless, the ACLU proudly bears the label "free speech absolutist." The parameters of the free speech debate are such that even those who are described as "free speech absolutists" or "purists" do not argue that all words and expressive conduct are absolutely protected. In truth, the only argument between free speech absolutists and others is not over whether speech can be regulated but only over when it can be regulated. Absolutists impose a heavier burden of proof on those who seek to justify speech restrictions.

Nadine Strossen, In the Defense of Freedom and Equality: The American Civil Liberties Union Past, Present, and Future, 29 Harv. C.R.-C.L. L. Rev. 143, 152-53 (1994) (footnotes omitted).

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This Essay first summarizes the positions of the two authors within the pornography debate as presented in these books. The second section analyzes specific drawbacks of Strossen's position as a free speech absolutist, with particular attention to her views on the economic effects of pornography restriction and on women's capacity to make moral choices. The third section assesses Strossen's views in the context of the Supreme Court's ruling on hate speech. n13 The fourth section explores the interrelationship of the pornography debate with racial and sexual harassment law, focusing on the two authors' different assessments of trends in sexual harassment law.

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n13. R.A.V. v. City of St. Paul, 112 S. Ct. 2538 (1992).

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The Essay then addresses in detail the merits of Strossen's argument that regulation of sexual expression as proposed by MacKinnon would result in unfair discrimination against lesbian and gay materials. Thus, this section examines some of the drawbacks of MacKinnon's legal theory of pornography. Finally, the sixth section explores other recently proposed approaches to ending sexual violence, which suggest the direction that future legal theories of pornography should take.

I. Is Pornography Harmful Conduct or Simply Expression?

Although both MacKinnon and Strossen address the impact of pornography on women's lives, often the points of disagreement between them center on the symbolism of the law's treatment of pornography. That is, both are concerned with how the law governing pornography affects society's perception of and treatment of women. Their analyses of the possible harms [*194] caused by pornography tend to conflate concrete problems, such as whether women are harmed in the making of pornography, with symbolic concerns, such as what kind of message would be sent about women if the law deemed that consent was not a defense to an allegation of harm. Throughout this Essay I will identify, where necessary, what level of harm is being addressed by each author (e.g., harm to individual women, whether within or outside of the pornography industry, or harm to women as a group). This should clarify the reasons for the differences between the two writers and, it is hoped, will ultimately point to ways that feminists can come together in the struggle to reduce sexual violence without compromising the right to free expression.

A. MacKinnon's Position: Pornography is Harmful Conduct

The divergence of the views held by MacKinnon and Strossen begins with their perceptions of the fundamental nature of pornography. For MacKinnon pornography is harmful conduct, and therefore not entitled to constitutional protection as speech. MacKinnon argues that pornography is what it does, or that pornography

is sex. n14 In Only Words, MacKinnon argues that under current law, pornography is treated as defamation rather than discrimination. n15 This leads to the perception that pornography's harm is something that is said (the expression of a point of view), rather than something that is done. It is this perception, MacKinnon argues, which leads to the erroneous idea that pornography is only harmful in that some people find it offensive. Therefore, her main argument is that the harm of pornography is not what it says, but what it does, and what it does is discriminate against women.

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n14. "There are many ways to say what pornography says, in the sense of its content. But nothing else does what pornography does. The question becomes, do the pornographers - saying they are only saying what it says - have a speech right to do what only it does?" MacKinnon, supra note 2, at 14-15.

n15. Id. at 11.

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1. How Pornography Harms Women

MacKinnon argues that there have been instances where words have been recognized as the acts that they are, such as saying "kill" to an attack dog. She notes that a sign saying "White Only" is seen as an illegal act of segregation rather than simply the protected expression of a point of view. Similarly, [*195] statements such as "sleep with me and I'll give you an A" are now legally recognized as acts of sexual harassment. n16

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n16. Id. at 11-14. MacKinnon was instrumental in developing the theory that sexual harassment on the job is sex discrimination. See, e.g., Catharine A. MacKinnon, Sexual Harassment of Working Women: A Case of Sex Discrimination (1979).

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MacKinnon proposes that pornography is conduct rather than speech in that it is sexual abuse which is either photographed or filmed. She notes that, "it is the pornography industry, not the ideas in the materials, that forces, threatens, blackmails, pressures, tricks, and cajoles women into sex for pictures. In pornography, women are gang raped so they can be filmed. They are not gang raped by the idea of a gang rape." n17 The harm in this sense is the harm to models posing for pornography.

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n17. MacKinnon, supra note 2, at 15.

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MacKinnon addresses those who would counter that the violence in pornography is simulated by responding:

In pornography, the penis is shown ramming up into the woman over and over; this is because it actually was rammed up into the woman over and over. In mainstream media, violence is done through special effects; in pornography, women shown being beaten and tortured report being beaten and tortured. n18

MacKinnon challenges the assumption that violent pornography is simply suggestive of, or an idea about, violence. She argues that actual violence is done to real women in the making of violent pornography.

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n18. Id. at 27.

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The second and most controversial way that MacKinnon argues that pornography is sex (and as such is conduct, not speech) is her contention that pornography causes men to respond to it with sexual violence. She argues that in this way pornography harms all women. For instance, MacKinnon argues that pornography causes rapists to rape:

This is not because they are persuaded by its ideas or even inflamed by its emotions, or because it is so conceptually or emotionally compelling, but because they are sexually habituated to its kick, a process that is largely unconscious and works as primitive conditioning, with pictures and words as sexual stimuli. Pornography consumers are not consuming an idea any more than eating a loaf of bread is consuming the ideas on its wrapper or the ideas in its recipe. n19

{*196} This is perhaps the most controversial of MacKinnon's arguments. n20

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n19. Id. at 16.

n20. In a review of Only Words, literary critic Carlin Romano notes that MacKinnon's critics ridicule her argument that pornography causes sexual violence as "junk science." Carlin Romano, Between the Motion and the Act, Nation, Nov. 15, 1993, at 563, 566. His own view of whether pornography causes men to enact violence is: "Probably true in some cases, but there's good reason to believe that pornographic materials, like prostitutes, also enable men to act in ways they don't or can't in their non-commercial intimate relationships, thus making porn a safety valve for male urges." Id. at 567.

Romano reinforces rather than refutes MacKinnon's argument. For him, pornographic materials and human prostitutes are reduced to an equivalency, both objects, both needed as "safety valves" for male urges. This is an implicit recognition that urges stimulated by pornography are dangerous. Yet Romano apparently sees no harm to an actual person if a prostitute is used as a safety valve. If it is acceptable for men to use real women who are prostitutes as "safety valves" for dangerous male urges, it seems clear that Romano believes that some women cannot be harmed. Perhaps he believes prostitutes are already degraded, so nothing can cause them moral harm. As to physical harm, perhaps

he thinks prostitutes are accustomed to and paid to function as safety valves. But if prostitutes and pornographic materials are perceived by Romano as equivalent, then surely it is not so ridiculous for MacKinnon to argue that some men cannot distinguish between the women in pornography and other women. Moreover, he never addresses whether something perhaps should be done about the violence he admits is "probably" caused by pornography. Id.

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Nonetheless, when it found the Indianapolis antipornography ordinance unconstitutional, the court in Hudnut did not grapple with the question of whether pornography causes men to rape women. n21 The ordinance was held to unconstitutionally restrict materials based on the viewpoint expressed. "Under the First Amendment the government must leave to the people the evaluation of ideas. Bald or subtle, an idea is as powerful as the audience allows it to be." n22 The Indianapolis ordi [*197] nance, according to the court, restricted materials based on the viewpoint expressed about women's sexuality and also established an acceptable viewpoint.

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n21. The court made clear that speech may not be restricted based on the viewpoint expressed regardless of whether the materials function as harmful conduct. The court accepted the premise that pornography harms women.

In saying that we accept the finding that pornography as the ordinance defines it leads to unhappy consequences, we mean only that there is evidence to this effect, that this evidence is consistent with much human experience, and that as judges we must accept the legislative resolution of such disputed empirical questions.

Hudnut, 771 F.2d at 329, n.2. The use of the euphemism "unhappy consequences" to refer to the harm it found may be an indicator of how serious the court really considers the harm to be.

n22. Id. at 328. The opinion goes on to discuss other cases where the government was prevented from restricting speech on the basis of the viewpoint expressed (citing Brandenburg v. Ohio, 395 U.S. 444 (1969) (permitting propagation of the ideas of the Ku Klux Klan); DeJonge v. Oregon, 299 U.S. 353 (1937) (upholding right of Communists to speak freely and run for office); Lebron v. Washington Metropolitan Area Transit Authority, 749 F.2d 893 (D.C. Cir. 1984) (upholding right to criticize the President by misrepresenting his positions and to post the misrepresentations on public property); Collin v. Smith, 578 F.2d 1197 (7th Cir. 1978), cert. denied, 439 U.S. 916 (1978) (upholding right of Nazi Party to march through a city with a large Jewish population)). Id. According to the court, these cases uphold the right to advocate the most despicable ideas. "They may do this because "above all else, the First Amendment means that government has no power to restrict expression because of its message [or] its ideas...' " Id. (quoting Police Department v. Mosley, 408 U.S. 92, 95 (1972)).

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Speech that portrays women in positions of equality is lawful, no matter how graphic the sexual content. This is thought control. It establishes an "approved' view of women, of how they may react to sexual encounters, of how the sexes may relate to each other. Those who espouse the approved view may use sexual images; those who do not, may not. n23

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n23. Id.

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Thus, the Hudnut court did not challenge MacKinnon's argument that pornography functions as conduct; the court simply considered the premise that pornography causes harm to be irrelevant. "If pornography is what pornography does, so is other speech." n24 Rather than state explicitly that harm caused by pornography does not matter, however, the court concluded that since pornography is powerful as speech, it is to be treated - and protected - as speech. n25 The opinion also cited earlier attempts to suppress speech because of the belief that the acceptance of the viewpoint expressed by the speech would lead to totalitarian government. These attempts were rejected as unconstitutional. n26

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n24. Id. at 329.

n25. Id.

n26. The Alien and Sedition Acts passed during the administration of John Adams rested on a sincerely held belief that disrespect for the government leads to social collapse and revolution - a belief with support in the history of many nations. Most governments of the world act on this empirical regularity, suppressing critical speech. In the United States, however, the strength of the support for this belief is irrelevant.

Id.

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In Only Words, MacKinnon responds to the reasoning in Hudnut by pointing out that the important distinction is not whether speech is also conduct but at what point the effect of speech which is also conduct begins to matter.

I am not saying that pornography is conduct and therefore not speech, or that it does things and therefore says nothing and is [*198] without meaning, or that all its harms are noncontent harms. In society, nothing is without meaning. Nothing has no content. Society is made of words, whose meanings the powerful control, or try to. At a certain point, when those who are hurt by them become real, some words are recognized as the acts that they are. n27

MacKinnon wants the law to acknowledge the harm to women from pornography as

real and to protect them from it.

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n27. MacKinnon, supra note 2, at 29-30.

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MacKinnon points out that rape and murder are not protected expression although, like all actions, they express ideas. n28 Moreover, it is discriminatory intent, a mental state, that is required to prove an act of discrimination under the Fourteenth Amendment. n29 Thus, she argues, it is illogical for the court to assert that speech can never be restricted because of the viewpoint expressed. Speech is restricted when its function is discrimination. n30

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n28. Id. at 30.

n29. Id. at 30 (quoting Personnel Administrator v. Feeney, 442 U.S. 256 (1979); Washington v. Davis, 426 U.S. 229 (1976)).

n30. MacKinnon points out that "the incoherence of distinguishing speech from conduct in the inequality context" is also apparent in R.A.V. v. City of St. Paul, 112 S. Ct. 2538 (1992). MacKinnon supra note 2, at 33. R.A.V. is discussed infra part III.

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MacKinnon also argues that it is ludicrous to equate the power of the pornography industry with the power of those who advocate for the overthrow of the U.S. government, as was done in Hudnut. "Need it be said, women are not the government? Pornography has to be done to women to be made; no government has to be overthrown to make communist speech." n31 Here, MacKinnon is alluding to two kinds of harm to women. One is the harm to women whose abuse is filmed and then characterized as the pornographer's expression. n32 The other is the harm that stems from courts denying women protection from pornography by characterizing a woman's challenge to pornography as analogous to the government suppressing unpopular political view [*199] points. That analogy turns the premise that women are powerful into a justification for denying women protection.

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n31. MacKinnon, supra note 2, at 39.

n32. To express eroticism is to engage in eroticism, meaning to perform a sex act. To say it is to do it, and to do it is to say it. It is also to do the harm of it and to exacerbate harms surrounding it. In this context, unrecognized by law, it is to practice sex inequality as well as to express it.

Id. at 33. Whether one agrees with this or not is likely to depend on whether or not one agrees that a particular erotic representation is one that is harmful to the woman presented, and that is where many people vehemently disagree.

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MacKinnon has previously challenged the traditional First Amendment principle that protection of all speech, including unorthodox expression, allows society to reach consensus on vital issues, free from government interference. She insists that pornography is not unorthodox expression but "the consensus." n33 In Only Words, she continues to articulate how pornography becomes the consensus:

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n33. See MacKinnon, Feminism Unmodified, supra note 5, at 130-31.

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As society becomes saturated with pornography, what makes for sexual arousal, and the nature of sex itself in terms of the place of speech in it, change. What was words and pictures becomes, through masturbation, sex itself. As the industry expands, this becomes more and more the generic experience of sex, the woman in pornography becoming more and more the lived archetype for women's sexuality in men's, hence women's, experience. n34

MacKinnon challenges not only the law, but the social fabric out of which legal opinions on pornography are crafted.

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n34. MacKinnon, supra note 2, at 25-26.

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Here, MacKinnon's concern is that the way the law treats pornography, as exemplified by the Hudnut decision, affects the way society perceives women. That is, the law influences people not to care about the harm done to women by pornography when it does not acknowledge the harm to be significant. In this sense, the mere legal recognition of harm would improve the status of women in society by sending the signal that harm to women will not be tolerated.

2. Balancing Equality and Free Speech

In the last section n35 of Only Words, entitled "Equality and Speech," MacKinnon argues that more weight should be given to the constitutional right to equality when it is balanced against the harm caused by infringement of another's free speech right. The premise of MacKinnon's argument is that the focus on whether or not speech has been unacceptably infringed ignores the unequal power of those with and without the ability to express their views. She argues that there is a tension between the First and Fourteenth Amendments; the First Amendment has taken prece [*200] dence over the Fourteenth, and we are mistaken to take for granted that it should.

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n35. The second section of the book, Racial and Sexual Harassment, is discussed infra part IV.

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MacKinnon develops this point by examining the reasoning behind New York Times Co. v. Sullivan. n36 In that case, the law of libel was first recognized as raising First Amendment issues. n37 Sullivan involved the publication of an advertisement in The New York Times attacking the racist acts of southern white police officers, who in turn sued The New York Times for libel. The Supreme Court, deciding in favor of the newspaper, held that in the interest of protecting the free speech of the press, a plaintiff would have to show that the publisher had actual malice when it printed false material. n38

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n36. 376 U.S. 254 (1964).

n37. MacKinnon, supra note 2, at 78.

n38. Sullivan, 376 U.S. at 279-80. For commentary on Sullivan, see generally Anthony Lewis, Make No Law: The Sullivan Case and the First Amendment (1992); Fred D. Gray, The Sullivan Case: A Direct Product of the Civil Rights Movement, 42 Case W. Res. L. Rev. 1223 (1992); Kermit L. Hall, Justice Brennan and Cultural History: New York Times v. Sullivan and Its Times, 27 Cal. W. L. Rev. 339 (1990-91); Sheldon W. Halpern, Of Libel, Language, and Law: New York Times v. Sullivan at Twenty-Five, 68 N.C. L. Rev. 273 (1990).

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MacKinnon claims that although the issue was never addressed directly, the Sullivan decision benefitted from pro-equality sentiment, and she posits that the outcome may have been different if, for example, the advertisement had been published by racists about civil rights leaders. n39 MacKinnon notes that Sullivan undermined Beauharnais v. Illinois, n40 which had held group defamation unprotected by the First Amendment. n41 MacKinnon [*201] laments the demise of Beauharnais because she notes that although the opinion did not mention equality, its effect had been to protect equality rights under the Fourteenth Amendment. n42 Had Beauharnais not been undermined by Sullivan, shesuggests, it could be used to justify a law designed to protect women's equality, such as her proposed antipornography legislation.

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n39. MacKinnon, supra note 2, at 79. As MacKinnon explains:

In reality, Sullivan was animated by issues of substantive equality as powerful as they were submerged; indeed, they were perceptible only in the facts. The case lined up an equality interest - that of the civil rights activists in the content of the ad - with the First Amendment interest of the newspaper. This aligned sentiment in favor of racial equality with holding libel law to standards of speech protection higher than state law would likely enforce on racists. In other words, Sullivan used support for civil rights to make it